Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,
PETITIONER,

v.

NEW YORK MAGAZINE, A DIVISION OF
PRIMEDIA MAGAZINES, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, contrary to *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), advertising space on public transit facilities is an unlimited public forum that must display any advertisement — even if illegal or detrimental to the transit agency's regular operations — unless the transit authority is able to demonstrate that rejection of the advertisement is an action that is narrowly tailored to serve a compelling governmental interest.

2. Whether, contrary to *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), a transit authority's refusal to display a commercial advertisement on its vehicles is a prior restraint, so that the agency must receive prior judicial approval of the decision not to display the advertisement.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 6

I. THE SECOND CIRCUIT'S HOLDING THAT PUBLIC TRANSIT ADVERTISING SPACE IS AN UNLIMITED FORUM IGNORES ESTABLISHED PRECEDENT AND CREATES PRACTICAL PROBLEMS THAT WARRANT THIS COURT'S REVIEW 7

A. The MTA's Advertising Space Is Nonpublic 8

B. Respondent's Advertisement Is Outside The Scope Of Any Designated Public Forum That Has Been Created By The MTA 16

C. The Public Forum Holding of the Court Below Conflicts With Decisions of Other State and Federal Courts 18

II. THE SECOND CIRCUIT'S HOLDING THAT REFUSAL OF COMMERCIAL ADVERTISING CONSTITUTES A PRIOR RESTRAINT WARRANTS REVIEW 20

CONCLUSION 27

TABLE OF AUTHORITIES

Pages

Cases:

Ackerley Communications of Mass., Inc. v. *City of Cambridge*, 88 F.3d 33 (1st Cir. 1993) 13

American Home Products Corp. v. *FTC*, 695 F.2d 681 (3d Cir. 1983) 22

Arkansas Educ. Television Comm'n v. *Forbes*, No. 96-779 (May 18, 1998) . . . . . *passim*

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963) 23

Beneficial Corp. v. *FTC*, 542 F.2d 611 (3d Cir. 1976) 22

Board of Trustees v. *Fox*, 492 U.S. 466 (1988) 21

Cafeteria & Restaurant Workers v. *McElroy*, 367 U.S. 886 (1961) 10

Central Hudson Gas & Electric Corp. v. *Public Service Comm'n*, 447 U.S. 557 (1980) . . . . *passim*

Christ's Bride Ministries, Inc. v. *Southeastern Pennsylvania Transp. Auth.*, 937 F. Supp. 425 (E.D. Pa. 1996) 19

City of Cleveland v. *Discovery Network, Inc.*, 507 U.S. 410 (1993) 22

Connick v. *Myers*, 461 U.S. 138 (1983) 10

Cornelius v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) . . . . . *passim*

Desert Outdoor Advertising v. *City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996) 23

Fargo Women's Health Org., Inc. v. *Larson*, 381 N.W.2d 176 (N. Dak. 1986) 22

Florida Bar v. *Went For It, Inc*, 115 S. Ct. 2371 (1995) 21

Friedman v. *Rogers*, 440 U.S. 1 (1979) 21

TABLE OF AUTHORITIES — Continued

Pages

Grolier, Inc. v. *FTC*, 699 F.2d 983 (9th Cir. 1983) 22

Hubbard Broadcasting, Inc. v. *Metropolitan Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir.), cert. denied, 479 U.S. 986 (1986) 19

In re Kitty's East, 905 F.2d 1367 (10th Cir. 1990) 23

International Society for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672 (1992) . . . . . *passim*

Kleiner v. *First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1995) 22

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) . . . . . *passim*

National Socialist Party v. *Village of Skokie*, 432 U.S. 43 (1977) 23-24

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) 24

New York Times v. *United States*, 403 U.S. 713 (1971) . . . 23

Opinion of the Justices to the Senate, 366 N.E.2d 1220 (Mass. 1977) 23

Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 9, 11

Planned Parenthood Ass'n/Chicago Area v. *Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir. 1985) 14

Planned Parenthood of Southern Nevada, Inc. v. *Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991) . . . 19

Porter Dietsch, Inc. v. *FTC*, 605 F.2d 294 (7th Cir. 1979) 22

Puerto Rico Tele-Com, Inc. v. *Ocasio Rodriguez*, 747 F. Supp. 836 (D.P.R. 1990) 23

Rogers v. *New York City Transit Auth.*, 680 N.E.2d 142 (N.Y. 1997) 18-19

TABLE OF AUTHORITIES — Continued

Pages

Rosenberger v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) 17

Sears, Roebuck & Co. v. *FTC*, 676 F.2d 385 (9th Cir. 1982) 22

Southeastern Promotions, Ltd. v. *Conrad*, 429 U.S. 546 (1975) . . . . . *passim*

Stratton v. *Sinks*, 741 P.2d 435 (N.M. Ct. App. 1987) . . . 23

United States Postal Service v. *Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) 9, 11

United States v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993) 21

United States v. *Kokinda*, 497 U.S. 720 (1990) . . . . . *passim*

Vance v. *Universal Amusement Co.*, 445 U.S. 308 (1980) . . 23

Virginia State Board of Pharmacy v. *Virginia Citizens Council*, 425 U.S. 748 (1976) 21

Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 25

Widmar v. *Vincent*, 454 U.S. 263 (1981) 14

Constitutional Provision and Statutes:

U.S. Const. amend. I . . . . . *passim*

28 U.S.C. § 1254(1) 1

New York Civil Rights Law § 50 (McKinney 1997) . . . *passim*

New York Civil Rights Law § 51 (McKinney 1997) 2

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 136 F.3d 123. The opinion of the district court (App., *infra*, 22a-49a) is reported at 987 F. Supp. 254.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1998, and a timely petition for rehearing was denied on March 17, 1998. App., *infra*, 50a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press."

STATEMENT

In this case, the court of appeals held that advertising space on Metropolitan Transportation Authority buses is an unlimited public forum and that the public transportation authority's decision to reject a commercial advertisement is a form of prior restraint. Under this holding, the Authority's subway, bus, and commuter rail systems may be required to display *any* advertisement, even if offensive or illegal; the Authority may remove the message only by going to court and establishing that its decision not to display the advertisement can survive strict First Amendment scrutiny. This remarkable ruling cannot be reconciled with the holdings of this and other courts, imposes a wholly unmanageable regime on public transit authorities, and is of immense practical importance to governments at all levels. Further review therefore is imperative.

1. Petitioner Metropolitan Transportation Authority ("MTA") is a New York public benefit corporation that, with its affiliated agencies, operates the subways and a majority of the buses in New York City, and provides regional commuter rail service. To raise revenue that it uses in support of its transit operations, the MTA leases advertising space on the exteriors of its buses, on car cards inside transit and rail vehicles, and at subway and rail stations. The MTA solicits and accepts this advertising through contractors, including Transportation Displays Incorporated ("TDI").

In 1994, the MTA promulgated Advertising Standards providing that the Authority would not accept commercial advertisements that are false, misleading, or deceptive; that promote illegal goods or services; that imply an endorsement by the MTA of a product or service; that depict activities harmful to minors under New York law; that contain obscene material; that contain an image that, if sold to a minor, would violate New York law; that would be libelous; that promote tobacco-related products; and — most important for present purposes — that violate New York Civil Rights Law § 50 (McKinney 1997). App., *infra*, 3a-4a. That statute makes it a criminal offense to use "for advertising purposes, or for purposes of trade, the name * * * of any living person without having first obtained the written consent of such person."[1] The MTA supplemented its list of inappropriate material in 1997, adding six additional categories, including advertisements that contain images of a person who appears to be a minor in sexually suggestive dress, pose, or context; that are adverse to the MTA's commercial or administrative interests; that demean individuals or groups on account of race, color, religion, national origin, ancestry, gender, age, disability, or sexual orientation; that contain images so violent, frightening, or otherwise disturbing as to be harmful to minors; that promote sexually oriented businesses; and that contain images that a significant segment of the public would view as patently offensive.

2. In September 1997, respondent New York Magazine entered into a contract with TDI, MTA's agent, to lease advertising space on MTA buses. The agreement provided that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character [and] text." App., *infra*, 3a. Respondent agreed to pay $85,000; for its part, the MTA would run a series of advertisements from late November through December 31, 1997, with the possibility of some additional time in January 1998. One of these advertisements (the "Advertisement") displayed the New York Magazine logo and, in a reference to New York City Mayor Rudolph Giuliani, carried the

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[1] In addition, New York Civil Rights Law § 51 permits any person whose name is so used for commercial purposes to recover compensatory and, in certain cases, exemplary damages.

copy: "Possibly the only good thing in New York Rudy hasn't taken credit for." *Id.* at 1a.

After the Advertisement appeared on several buses, the Mayor's office complained to the MTA, objecting to "the use of [Mayor Giuliani's] name to promote a commercial product" and asserting that the advertisement violates New York Civil Rights Law § 50. App., *infra*, 3a. The MTA agreed and accordingly discontinued display of the Advertisement. New York Magazine responded by bringing this action in United States District Court for the Southern District of New York, arguing that removal of the advertisement violated its First Amendment rights and demanding preliminary injunctive relief.[2]

The district court ruled for New York Magazine. The court first concluded that the Advertisement falls within the category of commercial speech, noting that "[i]ts central purpose is to advertise NY Magazine and thereby encourage sales." App., *infra*, 31a. The court next found that the exterior of MTA buses is a designated public forum (*id.* at 35a-38a), but reasoned that "strict scrutiny review is not applicable here because the Ad in issue involves commercial speech." *Id.* at 39a. Against this background, the court reasoned that if Section 50 "applies to the Ad in issue, then the Mayor's right of privacy/publicity must be balanced against Plaintiff's First Amendment rights. If this section does not apply, then neither the MTA nor the City has a substantial interest in removing the Ad." *Id.* at 39a. The court went on to conclude, as a matter of state law, that Section 50 does *not* apply to the Advertisement (since the advertisement "combines incidental use, public interest, and political satire"). *Id.* at 45a. The court accordingly held that the MTA was "unable to establish that [it] is acting in the public interest" in discontinuing the

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[2] Respondent also sued the City of New York, maintaining that the City violated the First Amendment and tortiously interfered with New York Magazine's contract. The district court found that respondent had not demonstrated a probability of success on the tort claim and respondent did not appeal that ruling. App., *infra*, 46a-48a. The Second Circuit subsequently held that respondent lacked standing to assert a First Amendment claim for injunctive relief against the City. *Id.* at 5a-6a. The propriety of that holding is not at issue here.

Advertisement (*id.* at 46a), and enjoined the MTA to display it. *Id.* at 49a.

A divided panel of the Second Circuit affirmed on grounds quite different from those relied upon by the district court. App., *infra*, 1a-21a. Unlike the district court, the court of appeals found it unnecessary to determine whether the Advertisement violates Section 50.[3] Instead, it held that *even if the Advertisement is illegal under New York law*, the MTA is required to display it.

The court held that MTA advertising space is an *unlimited* designated public forum and thus that content-based restrictions on transit system advertising are constitutional only if they are "narrowly drawn to achieve a compelling [governmental] interest." App., *infra*, 8a (citation omitted). The court rejected petitioner's argument that the advertising space is either a *limited* public forum, the contours of which are defined by the Advertising Standards, or a nonpublic forum, solely on the ground that the MTA accepts political advertising and "[a]llowing political speech * * * evidences a general intent to open a space for discourse." *Id.* at 11a. Petitioners argued that this conclusion was foreclosed by *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (plurality), which held that advertising space on public transit is *not* a "First Amendment forum" (*id.* at 304), and that a public transit agency "has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id.* at 303. The court of appeals declined to follow the authority of *Lehman*, however, distinguishing that case on the ground that the transit agency in *Lehman* had disallowed political advertising. App., *infra*, 11a-12a.

The court went on to hold that the MTA's decision not to accept an advertisement is a form of prior restraint — even when the advertisement is commercial speech. As a consequence, the court held that any such rejection must be accompanied by "'procedural safeguards'" that "require, inter alia, that 'the burden of instituting judicial proceedings, and of proving that the material

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[3] For present purposes, it therefore must be assumed that the Advertisement *does* violate Section 50; if certiorari is granted and the judgment below reversed, that issue would remain to be decided on remand.

is unprotected, * * * rest on the censor,' and that 'a prompt final judicial determination must be assured.'" App., *infra*, 13a (quoting *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975)). This holding means that the MTA is presumptively obligated to display *every* proposed advertisement even if it has a reasonable basis for exclusion; if the Authority finds an advertisement objectionable, its apparent recourse is to go to court (presumably in a declaratory judgment action), where it must attempt to satisfy the strict scrutiny standard and obtain judicial permission to cease running the offensive display. While the Second Circuit acknowledged this Court's decision in *Central Hudson Gas & Elec. Co.* v. *Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980), which observed "that commercial speech may qualify as one of the exceptions to the bar on prior restraints," the court of appeals saw "no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not." App., *infra*, 13a. The court therefore declined to decide whether the Advertisement "is actually commercial speech." *Id.* at 14a.

Judge Cardamone dissented. App., *infra*, 15a-21a. Noting that the MTA "operates its bus system as a commercial venture," he reasoned that the MTA "signaled its intent that the sides of buses were not to be considered public *fora* through its regulations, which, among other things, ban advertising that violates § 50 of the New York Civil Rights Law." *Id.* at 18a. He went on to find that, "[a]lthough bus placards have been dedicated to some First Amendment uses, and may therefore not be said to be a purely nonpublic forum, 'regulation of the reserved nonpublic uses would still require application of the reasonableness test.'" *Id.* at 18a-19a (quoting *United States* v. *Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion)). Pointing to this Court's decision in *Lehman*, he stated that "[w]hen a city is engaged in commerce * * * it need not accept every advertisement offered, but may make reasonable choices with respect to the advertising displayed on its vehicles." App., *infra*, 19a. Because Judge Cardamone concluded that the Advertisement does violate Section 50, he found the MTA's decision to be reasonable and would have upheld the Authority's decision to reject the advertisement.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case is of great practical and doctrinal significance. The court of appeals held that all public transportation agencies that sell space for both commercial and political advertising — and, for that matter, all other public entities that permit similar advertising in their facilities — have created general purpose public fora that are presumptively required to run *any* advertisement, even if the transit agency reasonably believes that the proposed advertisement is illegal, injurious to the public, or detrimental to the agency's regular operations. Under this rule, the agency could be forced to display advertisements that are indecent, or that are frightening or harmful to children, or that vilify members of the public on racial or gender grounds, or that violate state law; the agency's apparent recourse, according to the Second Circuit, is to go to court to try to establish that its restriction is narrowly tailored to achieve a compelling governmental purpose. See App., *infra*, 12a-13a. This standard imposes a wholly unmanageable regime on public authorities and renders unconstitutional the operating practices of virtually every public transportation agency.

The extraordinary rule adopted below cannot be reconciled with the decisions of this and other courts. The Second Circuit's holding that the MTA established an unlimited public forum, and that its commercial advertising restrictions accordingly must be subjected to the highest level of First Amendment scrutiny, disregards this Court's ruling in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974), that advertising space on public transit is not a "First Amendment forum," and is flatly inconsistent with this Court's repeated admonition that courts "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 803 (1985). The court of appeals' conclusion that the MTA's refusal to run a commercial advertisement constitutes a form of "prior restraint" likewise disregards this Court's rulings in *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980), and other cases, that commercial speech is not subject to the ban on prior restraints. The court of appeals simply rejects this Court's teaching that public agencies must be permitted to exercise the business judgment that their clientele legitimately expect from

any vendor of advertising space, whether public or private. See *Lehman*, 418 U.S. at 303-304.

Indeed, the court of appeals' opinion verges on deliberate evasion of this Court's precedents. The court of appeals distinguished *Lehman* on grounds that have nothing to do with the holding of that case (see pages 13-15, *infra*); it embraced the position of the *dissenting* opinion in *Cornelius* for its basic understanding of designated public forum doctrine (see page 16-17, *infra*); and it disregarded this Court's thrice-repeated distinction between commercial and noncommercial speech under prior restraint doctrine with the dismissive comment that it "s[aw] no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not" (App., *infra*, 13a). Because the holding below defies this Court's prior rulings, throws an important area of First Amendment law into confusion, conflicts with decisions of state and federal courts, requires wholesale revision of the policies of countless public agencies, and imposes impracticable procedural and substantive requirements that will cause considerable public injury, review by this Court is warranted.

I. THE SECOND CIRCUIT'S HOLDING THAT PUBLIC TRANSIT ADVERTISING SPACE IS AN UNLIMITED FORUM IGNORES ESTABLISHED PRECEDENT AND CREATES PRACTICAL PROBLEMS THAT WARRANT THIS COURT'S REVIEW

It has long been settled that "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius*, 473 U.S. at 799-800. Instead, the Court has adopted "a 'forum based' approach to assessing restrictions that the government seeks to place on use of its property." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"). See *Arkansas Educ. Television Comm'n* v. *Forbes*, No. 96-779 (May 18, 1998), slip op. 9-10. Under this familiar analysis, speech on government property that has traditionally been available for public expression (a "traditional" public forum) is subject to the highest scrutiny. Other government

property — a "designated" public forum — may be intentionally opened either for general public expression (an "unlimited" public forum) or for specific types of speech, defined by speech content or by speaker identity (a "limited" public forum). Within this second category, any restrictions on speech that fall within the contours of the forum, as established by the government, is subject to strict scrutiny, just as in a traditional public forum; but the limitations on the forum itself, whether based on speech content or on speaker identity, need only be reasonable and viewpoint-neutral. Finally, property that has not been made generally accessible for the purpose of public expression is either a "nonpublic" forum or no forum at all. Within this category, the government is free to restrict speech on any reasonable and viewpoint-neutral ground. See *Forbes*, slip op. 10; *ISKCON*, 505 U.S. at 678-679; *id.* at 687 (O'Connor, J., concurring); *Cornelius*, 473 U.S. at 802.

In concluding that public transit advertising space is an "unlimited" public forum, the court below went fatally astray. The MTA has *never* opened its facilities for unlimited public expression. Indeed, its sole purpose in permitting advertising *at all* is to generate revenue, and the MTA has consistently restricted access, on a case-by-case basis, to paying customers who comply with its Advertising Standards. Even if this practice could be construed to create a designated public forum, that forum has never been unlimited. Its contours are set by the Advertising Standards. Contrary to the Second Circuit's decision, those limitations on the forum are not properly subject to strict scrutiny, but must be upheld so long as they are reasonable and viewpoint neutral.

A. The MTA's Advertising Space Is Nonpublic

1. At the outset, the MTA's advertising space should not be regarded as a public forum *at all*. It is undisputed that advertising displays in public transit systems are not a *traditional* public forum. And under the standards articulated by this Court, the MTA cannot be thought to have transformed its advertising space into a *designated* public forum. The Court has explained that the government creates such a forum "only by *intentionally* opening a nontraditional forum *for public discussion*" (*Cornelius*, 473 U.S. at 802 (emphasis added)) in a manner that "make[s] the property 'generally available' * * * to a class of speakers." *Forbes*, slip

op. 11 (citation omitted). See *ISKCON*, 505 U.S. at 679-680. For several reasons, the Second Circuit's holding that MTA advertising space satisfies this test cannot be reconciled with this Court's decisions.

First, whether or not a facility is "generally accessible to the public," government property will be deemed to be a public forum only if it has as "a principal purpose promoting 'the free exchange of ideas.'" *ISKCON*, 505 U.S. at 675, 682 (quoting *Cornelius*, 473 U.S. at 809). And while a facility may have such a purpose when the government "makes its property generally available to a certain class of speakers," "the government does *not* create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission' * * * to use it." *Forbes*, slip op. 12 (emphasis added) (citation omitted). That is the case here. MTA space is not "generally available": it is open only to persons who pay for the privilege of access, and the MTA (or its agent) screens all advertisements in advance to assure compliance with the MTA's standards. No decision of this Court has treated such a governmental facility as a public forum.

To be sure, the MTA permits advertisers to use its advertising space for the purpose of communicating with potential customers. But the Court consistently has rejected the assertion that "simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum. [The Court's] cases provide no support for such a sweeping proposition." *United States Postal Service* v. *Greenburgh Civic Ass'n*, 453 U.S. 114, 130 n.6 (1981). See *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) ("the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum"). Indeed, addressing *Lehman* v. *City of Shaker Heights*, *supra*, a case in which a public transit authority permitted advertising on its vehicles but rejected advertisements displaying particular types of messages, the Court explained that "the advertising space made available in public transportation in the city of Shaker Heights [was] 'specifically used for the communication of information and ideas,' but that fact alone was not sufficient to transform that space into a 'public forum' for First Amendment purposes." *Greenburgh Civic Ass'n*, 453 U.S. at 130 n.6 (citation omitted). See also *Cornelius*, 473 U.S. at 803, 805.

Here, the purpose of making advertising space on MTA conveyances available for paid advertising is *not* to permit the free exchange of ideas. The MTA's intent, instead, is to generate revenue for the public transportation system, in a manner consistent with — and subordinate to — the MTA's primary mission of providing safe, efficient transportation in pleasant surroundings to a diverse public, including children. The MTA has no intention of opening its advertising space indiscriminately to all speakers, without regard to the effect of their messages on the quality of the transportation experience.

Second, the Court has indicated that the intent to create a public forum generally will be absent in cases where the government acts in a commercial or proprietary capacity. "When the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its actions will not be subjected to the heightened review to which its actions as lawmaker may be subject." *ISKCON*, 505 U.S. at 678. Pointing again to the mass transit advertising in *Lehman*, the Court explained that it had invoked this distinction to "uph[o]ld a ban on political advertising in city operated transit vehicles, * * * even though the city permitted other types of advertising on those vehicles." *Ibid.*; see *Kokinda*, 497 U.S. at 725 (plurality opinion) ("It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny where 'the governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its] internal operation[s] ...'") (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 896 (1961) (ellipses and bracketed material added by the Court)).[4] The conclusion in *Lehman* followed from the rationale for the public forum doctrine: an agency that sells space only to those who can pay surely has not dedicated its property to "'public

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[4] The Court has employed a similar understanding in cases involving First Amendment challenges brought against governments in their capacity as employer. See, *e.g.*, *Connick* v. *Myers*, 461 U.S. 138, 146 (1983) ("government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment").

discourse.'" *Forbes*, slip op. 10 (quoting *Cornelius*, 473 U.S. at 802).

Indeed, *Lehman* — the Court's leading decision involving advertising on public property — clearly illustrates the governing principles. There, a municipal transit system sold advertising space on car cards in its vehicles. The advertising was managed by an agency hired by the city, which was authorized to disapprove advertisements that did not comply with the city's standards. See 418 U.S. at 299-300 & n.1 (plurality opinion). The city accepted all manner of commercial advertisements, as well as noncommercial messages from churches and "civic and public-service oriented groups," but declined to carry political advertisements. *Id.* at 300. A political candidate brought suit to challenge this exclusion.

The Court rejected the claim, holding that advertising regulation was subject only to the scrutiny for reasonableness that is appropriate for a nonpublic forum. As the Court explained,

> [T]he city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303 (plurality opinion).[5]

The Court accordingly held that

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[5] While there was no majority opinion in *Lehman*, Justice Blackmun's opinion for the plurality has repeatedly been cited with approval by the Court. See, *e.g.*, *ISKCON*, 505 U.S. at 678; *United* States v. *Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion); *Cornelius*, 473 U.S. at 803-804; *Perry*, 460 U.S. at 47, 49 n.9; *Greenburgh Civic Ass'ns*, 453 U.S. at 129, 130 n.6.

> [n]o First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

418 U.S. at 304 (plurality opinion). The Court added that, "[w]ere we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Ibid.*

The Court has since confirmed that *Lehman* falls squarely into modern forum analysis, characterizing the case as one where the facility remained nonpublic because

> the city intended to limit access to the advertising spaces on city transit buses. * * * [I]ts management contract required the managing company to exercise control over the subject matter of the displays. * * * Additionally, the Court found that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum.

Cornelius, 473 U.S. at 803-804. See *Kokinda*, 497 U.S. at 725 (plurality opinion).

2. The Second Circuit should have regarded *Lehman* as controlling. Its failure to do so threatens to cause considerable confusion about the meaning of a decision that for some 25 years has been this Court's only direct word on the rules governing the rental of advertising space by governmental entities. *Lehman* and this case are, in all essential respects, identical. In each, a public authority sold advertising space on its transit facilities, while barring certain types of offensive or controversial advertisements; in each, the agency "intended to limit access to the advertising spaces on city transit buses"; in each, the agency's "management contract required the managing company to exercise control over the subject matter of the displays"; in each, the agency's "use of the property as a commercial enterprise was inconsistent with an intent to dedicate the car cards as a public forum." *Cornelius*, 473

U.S. at 803-804. It could not be said in either case that the agency's "principal purpose" in renting advertising space was "'promoting the free exchange of ideas.'" *ISKCON*, 505 U.S. at 682 (citation omitted). To the contrary, the rental was part of a "commercial venture" (*Lehman*, 418 U.S. at 303 (plurality opinion)) and was intended only to "raise[] revenue for [the agency's] operation." App., *infra*, 2a. And it could hardly be thought that the government in either case had "'open[ed] a nontraditional forum for public discourse'" (*ISKCON*, 505 U.S. at 680 (citation omitted)); in fact, MTA's advertising space (like that in Shaker Heights) is *closed* to everyone who is unable or unwilling to pay the MTA's prescribed rates.

In distinguishing *Lehman* and holding the MTA's advertising space to be a public forum, the Second Circuit pointed to a single consideration: that the MTA accepts paid political advertisements. The court reasoned that "[d]isallowing political speech, and allowing commercial speech only, indicates that making money is the main goal," while "[a]llowing political speech * * * evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice." App., *infra*, 11a. The court of appeals therefore ruled that a public agency that accepts political advertisements is acting as a "regulator" and not as a "proprietor." *Ibid.*[6]

This reasoning, however, is a non sequitur. The decision to accept *paid* political advertising is entirely consistent with MTA's proprietary role and with the "main goal" of "making money"; after all, privately owned media (such as billboards) also typically display political advertising. See, *e.g.*, *Ackerley Communications of Massachusetts, Inc.* v. *City of Cambridge*, 88 F.3d 33, 37 n.10 (1st Cir. 1996). Nowhere in *Lehman* (or in its more recent decisions discussing *Lehman*) has this Court suggested that it was Shaker Heights' exclusion of political advertising that rendered the

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[6] As we have noted, the court did not suggest that the MTA *actually* acted with the purpose of opening "a space for discourse"; it relied entirely on the fact that the MTA accepts political advertisements.

car cards a nonpublic forum.[7] Instead, the Court found it crucial that the advertising space in *Lehman* was maintained for proprietary purposes and that the city "*intended* to limit access to advertising spaces on city transit buses." *Cornelius*, 473 U.S. at 803 (emphasis added). Precisely the same is true here: that the MTA accepts political advertising in no way detracts from its intent to exclude other categories of speech (such as advertisements displaying sexually exploitative images of minors) that are, in the MTA's business judgment, incompatible with the interests of the transit system and its passengers. "'Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.'" *Forbes*, slip op. 13 (quoting *Cornelius*, 473 U.S. at 805).[8]

In fact, the Second Circuit's decision would create a perverse system of incentives that would *reduce* the opportunities for political speech. The court of appeals' decision imposes an "all-

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[7] Indeed, the city in *Lehman* did not "allow[] commercial speech only," as the court of appeals believed (App., *infra*, 11a); Shaker Heights accepted noncommercial "service oriented advertising" as well. 418 U.S. at 304 (plurality opinion).

[8] The decisions of this Court that were relied upon by the Second Circuit (at App., *infra*, 10a), *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), have no bearing here. In *Widmar*, which involved university facilities that were made available to student groups, the university "evidenced a clear intent to create a public forum"; moreover, "a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius*, 473 U.S. at 802-803. See *Widmar*, 454 U.S. at 264-265. Neither of these considerations is present here. In *Southeastern Promotions*, "the Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities." *Cornelius*, 473 U.S. at 803. Here, as we have explained, the MTA makes advertising space available for quite a different purpose. Indeed, the Court in *Southeastern Promotions* simply assumed without discussion that the facilities at issue were public fora. See 420 U.S. at 555. See also *Planned Parenthood Ass'n/Chicago Area* v. *Chicago Transit Auth.*, 767 F.2d 1225, 1231 (7th Cir. 1985) (*Southeastern Promotions* "appears to have been" a situation where facilities were "opened generally for all expressive activity").

or-nothing choice" (*Forbes*, slip op. 12) for public agencies: if they accept political as well as commercial advertisements, they lose their discretion to establish standards for their advertising space. Faced with this unpalatable prospect — in which an agency's decision to display political messages means that it also must carry materials that, for example, are so violent that they disturb children — agencies can be expected to decline to allow political speech in their advertising space. As the Court recently observed in a related setting, the Second Circuit's rule accordingly "would result in less speech, not more" (*id.* at 13 (internal quotation marks and citations omitted)). In these circumstances, recognizing a right of access "would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to [political] speech * * * at all." *Kokinda*, 497 U.S. at 733 (plurality opinion). Needless to say, "[a] First Amendment jurisprudence yielding these results does not promote speech but represses it." *Forbes*, slip op. 14.

It should be added that, under the proper standard, there can be no doubt that the MTA's exclusion of illegal advertisements should survive. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. And the "restriction need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *ISKCON*, 505 U.S. at 683 (emphasis in original; citations and internal quotation marks omitted). See *Forbes*, slip op. 14-16. Here, the MTA's rejection of respondent's advertisement is grounded in an objective policy (compare, *e.g.*, *Forbes*, slip op. 8 (Stevens, J., dissenting)), is viewpoint-neutral, and is eminently reasonable. The State of New York has made it a criminal offense for advertisers to appropriate the names of living persons to facilitate the sale of commercial goods; it would be quite remarkable to suggest that any medium (whether a private billboard company or the MTA) acts improperly when it declines to run an advertisement for the purpose of complying with the law. See generally *Cornelius*, 473 U.S. at 808; *Kokinda*, 497 U.S. at 736 (plurality opinion).[9]

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[9] The court of appeals did make the peculiar suggestion that the MTA should be deemed to have acted in a regulatory rather than a proprietary

B. Respondent's Advertisement Is Outside The Scope Of Any Designated Public Forum That Has Been Created By The MTA

The Second Circuit also must be understood to conflict with this Court's precedents — and to create the same degree of doctrinal and practical confusion — if MTA advertising space is deemed to be a designated public forum. "Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, * * * regulation of the *reserved nonpublic uses* would still require application of the reasonableness test." *Kokinda*, 497 U.S. at 730 (plurality opinion) (emphasis added). The court of appeals, however, read that test off the books whenever a designated public forum permits political speech.

Even assuming that the MTA created a designated public forum, the Authority expressly provided that certain types of expression — those identified in its Advertising Standards — fall outside the scope of the forum. In nevertheless holding that the MTA has created an *unlimited* public forum, the court of appeals (relying on the *dissenting* opinion in *Cornelius* (see App., *infra*,

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capacity because "[t]here is no commercial reason why MTA has any special interest in the policy behind § 50; MTA's interest is only the interest in upholding the law because it is the law." App., *infra*, 12a. The court added that "[a]lthough the interest in avoiding litigation could be characterized as commercial, the indemnity clause of the Agreement, which provides that the advertiser bears full liability for any damages incurred in the litigation, fully protects that interest." *Id.* at 12a n.3. This conclusion, however, flies in the face of the general proposition that all entities, private as well as public, are obligated to obey the law. If the State of New York expects private companies to comply with Section 50 (as it most assuredly does), a public instrumentality hardly can be thought to act as a regulator when it obeys the same law. Moreover, even apart from the obligation of all parties to comply with state criminal law, the court of appeals' reliance on the indemnity agreement is chimerical. As Judge Cardamone noted, "indemnity agreements are not self-executing, and a party's attempt to enforce their provisions often leads to extensive legal battles. In short, an indemnity agreement does not eliminate litigation." App., *infra*, 20a. The MTA's interest in avoiding this aggravation and expense provides an obvious "commercial" justification for its policy.

11a)) reasoned that "it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content." *Ibid.* This reasoning, however, contradicts the very idea of a *limited* public forum, which is, by definition, a space in which the government excludes some types of speech and includes others. Contrary to the Second Circuit, such exclusions, which define the contours of the designated public forum, need only be reasonable and viewpoint neutral.

Establishing limits on the scope of a designated public forum does not "convert[] [it] into a non-public forum," as the court of appeals believed. "[T]he State must respect the lawful boundaries it has itself set" (*Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995)), and any exclusion of speech *within* the contours of the designated forum (as set by the state) therefore must be justified by a compelling government interest. At the same time, however, limits on the forum — and the exclusion of speech that falls *outside* of those limits — need only be reasonable and viewpoint-neutral to survive First Amendment scrutiny. See *id.* at 829-830; *Kokinda*, 497 U.S. at 730; *Cornelius*, 473 U.S. at 802.

Here, if MTA advertising space is a public forum at all, the scope of that forum is limited by the Advertising Standards to exclude speech that is inconsistent with the MTA's function. The MTA has concluded that advertisements of the sort identified by the standards are incompatible with the MTA's commercial or administrative interests, or with the welfare of its riders, in ways that are not true of other commercial or political speech. The court of appeals did not dispute that this judgment is reasonable. While the court of appeals blithely asserted that "[a]llowing political speech * * * evidences * * * a deliberate acceptance of the possibility of clashes of opinion and controversy that [is] * * * inconsistent with sound commercial practice" (App., *infra*, 11a), that simply is not so. As we have noted, private advertising media generally display political advertising. And a sign that urges

readers to "Vote for Jones" surely is less offensive to the bulk of the MTA's ridership than one that displays minors in sexually provocative poses, and is less problematic for the Authority than one (like the advertisement at issue in this case) that violates state law and is likely to embroil the MTA in extended litigation. It therefore is insupportable to conclude, as did the court of appeals, that the decision to accept paid political advertising necessarily is meant to surrender all discretion to exclude illegal and offensive advertisements.

C. The Public Forum Holding of the Court Below Conflicts With Decisions of Other State and Federal Courts

Given the ways in which the decision below departed from this Court's teachings, it is no surprise that Second Circuit's holding conflicts with the decisions of other courts. Indeed, the decision below cannot be reconciled with a recent ruling of New York State's highest court, which held that New York City subway platforms are not an unlimited public forum — even though political speech is permitted on the platforms — and that the exclusion of specified types of speech therefore must be judged under a reasonableness test. *Rogers* v. *New York City Transit Auth.*, 680 N.E.2d 142 (N.Y. 1997). In *Rogers*, the New York City Transit Authority "opened limited access to its subway stations to a variety of nontransit expressive activities, including 'public speaking; distribution of written noncommercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; [and] solicitation for charities.'" *Id.* at 147 (citation omitted). But the Transit Authority precluded "commercial activity" on subway platforms, and for that reason barred the plaintiff from selling his political literature in subway stations. See *id.* at 144-145, 147.

The New York Court of Appeals upheld this exclusion against First Amendment attack, finding that the Transit Authority's restrictions on expression were subject to review only for reasonableness. The court acknowledged that "Rogers' general right to sell books * * * falls within First Amendment protection." 680 N.E.2d at 145. But looking to this Court's cases, the state court applied the principle that "allows government, when it acts as proprietor, to reserve property for its intended primary purpose,

as long as restrictive regulations on speech are reasonable and not an effort to suppress expression because of disagreement with the speaker's view." *Id.* at 146. In reaching this conclusion, the court expressly rejected the contention "that the Transit Authority's authorization of specified speech activities converts the subway system into a wholesale public forum." *Id.* at 149.

The decision below is in clear conflict with *Rogers*. While the Second Circuit found it dispositive that the MTA permits political advertisements, the New York Court of Appeals held that the Transit Authority did not create an unlimited public forum even though it expressly permitted political and other forms of noncommercial speech. This conflict between the Second Circuit and New York's highest court — on a subject of great practical importance to public transportation systems throughout that State — is intolerable and should be resolved by this Court.

The decision below also is in tension with the holdings of other federal courts of appeals. In *Planned Parenthood of Southern Nevada, Inc.* v. *Clark County School Dist.*, 941 F.2d 817 (9th Cir. 1991) (en banc), for example, a school sold advertising space in school publications but declined to run an advertisement submitted by Planned Parenthood. The Ninth Circuit held that the publications were not a public forum because school officials retained the right to disapprove particular advertisements (see *id.* at 825) and the evidence did not "suggest that the high schools were 'motivated by an affirmative desire to provide an open forum' for advertising * * *; the schools did not accept advertising for any purpose other than to help defray the costs of this service." *Id.* at 824, quoting *Cornelius*, 473 U.S. at 805. And in *Hubbard Broadcasting, Inc.* v. *Metropolitan Sports Facilities Comm'n*, 797 F.2d 552 (8th Cir.), cert. denied, 479 U.S. 986 (1986), the Eighth Circuit held that advertising space in a public sports facility is not a public forum; the court found it dispositive that "[h]ere, as in *Lehman*, the city is engaged in commerce." *Id.* at 556. Accord *Christ's Bride Ministries, Inc.* v. *Southeastern Pennsylvania Transp. Auth*, 937 F. Supp. 425, 431 (E.D. Pa. 1996) (although transit authority accepted political advertising, subway and rail systems are a nonpublic forum because the authority "is acting here as a proprietor and not as a lawmaker or regulator"). Review to clarify the governing standard therefore is in order.

II. THE SECOND CIRCUIT'S HOLDING THAT REFUSAL OF COMMERCIAL ADVERTISING CONSTITUTES A PRIOR RESTRAINT WARRANTS REVIEW

The court of appeals thus committed a serious error in holding that the MTA's advertising space is a public forum. And the court greatly compounded its mistake by proceeding to rule, in open disagreement with opinions of this Court, that the MTA's refusal to display respondent's advertisement is a form of prior restraint, notwithstanding its commercial character. This holding has far-reaching and startling implications. It means that the MTA lacks the discretion to refuse advertisements in violation of its Standards, even assuming those Standards are substantively valid, without undertaking cumbersome judicial proceedings in which the MTA bears the burden of proof and the standard is strict scrutiny. Under the Second Circuit's application of prior restraint doctrine, it would appear that the MTA may decline to run an offending advertisement only by "'instituting judicial proceedings'" and "'proving that the material is unprotected'" in a forum where "'a prompt final judicial determination [is] assured.'" *Id.* at 12a-13a (quoting *Southeastern Promotions*, 420 U.S. at 559). This impractical and intrusive requirement will radically alter the manner in which public transit authorities (and similar entities) carry out their business, while burdening courts and public agencies alike.

These unfortunate practical effects are a consequence of the Second Circuit's disregard for the limits on prior restraint doctrine. The court of appeals simply dismissed this Court's admonition that commercial speech is not entitled to the full protections of prior restraint doctrine. And the court below failed to recognize the utter inapplicability of prior restraint analysis in situations like this one, where the speaker necessarily must obtain advance approval from the government to make use of state facilities.

1. This Court has indicated that the bar on prior restraints has no application to commercial speech. Noting that "commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it," the Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557, 571 n.13 (1980), indicated that a regulatory commission could impose "a system of previewing advertising campaigns" to

ensure compliance with state requirements. The Court made a similar point in *Virginia State Board of Pharmacy* v. *Virginia Citizens Council*, 425 U.S. 748, 771-772 n.14 (1976), observing that, "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely"; "the greater objectivity and hardiness of commercial speech * * * may * * * make inapplicable the prohibition against prior restraints." Accord *Friedman* v. *Rogers*, 440 U.S. 1, 10 (1979).

The court below recognized that this Court "has indicated that commercial speech may qualify as one of the exceptions to the bar on prior restraints" (App., *infra*, 13a), but it declined to follow this Court's teaching because it "s[aw] no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not." *Ibid.* The reasons, however, are those stated by this Court: "Commercial speech, because of its importance to business profits, and because it is carefully calculated, is * * * less likely than other forms of speech to be inhibited by proper regulation." *Friedman*, 440 U.S. at 10. Indeed, this conclusion is compelled by the nature of the Court's commercial speech doctrine. While commercial speech doubtless is entitled to substantial protection under the First Amendment, the Court consistently has held that "[t]he Constitution * * * accords a *lesser* protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson*, 447 U.S. at 562-563 (emphasis added). The Court therefore has subjected restrictions on commercial speech to a scrutiny that is less searching than that accorded regulations of noncommercial expression. See, *e.g.*, *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995); *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418 (1993). For similar reasons, the full panoply of doctrines designed to assure expansive protection for political and other forms of noncommercial speech do not apply to commercial expression. See, *e.g.*, *Friedman*, 440 U.S. at 11 n.9 ("overbreadth analysis [is] not applicable to commercial speech"); *Board of Trustees* v. *Fox*, 492 U.S. 469 (1988). Against this background, it would be anomalous for the Court to draw a different balance in this one

setting by according commercial speech the full protection of the bar on prior restraints.[10]

In light of this principle, other courts of appeals have rejected application of the prior restraint doctrine to commercial speech. In fact, the courts of appeals routinely uphold agency orders that preclude specified types of advertising so as to prevent deceptive statements, rejecting the argument that such orders should be set aside as prior restraints. See, *e.g.*, *Grolier, Inc.* v. *FTC*, 699 F.2d 983, 988 (9th Cir. 1983); *Sears, Roebuck & Co.* v. *FTC*, 676 F.2d 385, 399 (9th Cir. 1982); *American Home Products Corp.* v. *FTC*, 695 F.2d 681, 713-714 (3d Cir. 1983); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 619 (3d Cir. 1976); *Porter Dietsch, Inc.* v. *FTC*, 605 F.2d 294, 304 (7th Cir. 1979). These orders, which were entered to prevent deceptive advertising, surely would have been regarded as impermissible prior restraints in a noncommercial setting. Other courts also have recognized that, because "[i]n the domain of commercial speech * * * the Supreme Court has issued repeated admonitions against the wholesale incorporation of the law of prior restraints," courts must apply "a relaxed standard of scrutiny better suited to the hardiness of commercial speech." *Kleiner* v. *First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1995). Accord *Fargo Women's Health Org., Inc.* v. *Larson*, 381 N.W.2d 176, 180 (N. Dak. 1986) ("prior restraint on

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[10] Noting that "the determination whether speech is commercial or not may be fraught with ambiguity" (App., *infra*, 13a), the court of appeals opined that it "need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the question alone convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech." *Id.* at 14a. But this judicial punt — in which the court applied prior restraint rules to all commercial speech because it is sometimes difficult to determine whether a given advertisement should be classified as commercial or noncommercial — is insupportable. This Court has itself often noted the difficulty of determining whether particular speech should be deemed commercial (see, *e.g.*, *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 419 (1993)), but that has not led the Court to eliminate the well-established distinction in the level of scrutiny accorded commercial and noncommercial expression. The court of appeals offered no justification for taking a different approach here.

commercial speech is allowed to an extent which would not be allowed toward other forms of protected speech"); *Stratton* v. *Sinks*, 741 P.2d 435, 439 (N.M. Ct. App. 1987) ("the prohibition against prior restraint does not apply to commercial speech"); *Opinion of the Justices to the Senate*, 366 N.E.2d 1220, 1223 (Mass. 1977) ("[i]t is likely that no rule against 'prior restraint,' such as applies to noncommercial discourse, will be thought relevant to [commercial] advertising"); *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836, 842 (D.P.R. 1990) ("the strong presumption against the validity of prior restraints does not apply in the commercial speech context").[11] Further review by this Court to resolve this recurring and important issue plainly is in order.

2. Next, and perhaps more fundamentally, the prior restraint doctrine can have no logical application in a case of this kind, where the speaker must, of necessity, obtain advance permission to gain access to scarce government resources. The bar against prior restraints makes sense when, for example, the government is seeking to stop publication of a newspaper (*e.g.*, *New York Times* v. *United States*, 403 U.S. 713 (1971) (per curiam)) or of a book (*e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963)), or attempts to prevent exhibition of a film in a private theater (*e.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980)), or tries to preclude a march in a traditional public forum (*e.g.*, *National*

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[11] The decisions from other circuits cited by the court of appeals (App., *infra*, 14a) do not support its position. In *Desert Outdoor Advertising* v. *City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), the Ninth Circuit did not hold that restrictions on commercial advertising are unconstitutional unless they are authorized in advance by judicial proceedings. The court decided only that issuance of billboard construction permits may not be left to the "unbridled discretion" of government officials. *Id.* at 818. Indeed, *Desert Outdoor* is inconsistent with the Second Circuit's decision, since it presupposes that the government may impose a permit requirement (a form of prior restraint) if the governing standards are objective and satisfy the *Central Hudson* test. See *id.* at 818-819. The Tenth Circuit's decision in *In re Kitty's East*, 905 F.2d 1367 (10th Cir. 1990), simply held that the district court had "equitable jurisdiction" to review the seizure of "adult" books and videos; the case did not involve commercial speech at all. See *id.* at 1371.

Socialist Party v. *Village of Skokie*, 432 U.S. 43 (1977)). In such cases, the speaker has an essentially absolute entitlement to speak then and there, and a prior restraint accordingly imposes "an immediate and irreversible sanction." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 559 (1976). The importance of "the element of time" makes the restraint impermissible. *Id.* at 561.

But entirely different considerations apply in the circumstances of this case, where the speaker, of necessity, must apply to the government *in advance* for permission to use state facilities. This is not a situation where all the government must do is stand aside and allow the speaker to have its say; instead, the state must act affirmatively to make its property available, and must choose between competing applicants for the space. Here, delay is inevitable: a putative advertiser must apply for advertising space (or wait to be solicited by TDI), must negotiate contract terms (since even the Second Circuit did not suggest that the MTA is obligated to make its display space available *gratis* to persons who cannot pay), and must wait for the limited advertising space to open up. Because the advertiser thus cannot have an entitlement to speak whenever it would like, the immediacy that underlies the prior restraint doctrine is wholly absent. There accordingly can be no justification for subjecting the government to the extraordinary requirement that it obtain prior judicial approval when it makes its prospective allocations of advertising space.

This Court's decision in *Southeastern Promotions*, relied upon by the court of appeals (App., *infra*, 12a-13a), does not support extension of prior restraint doctrine to the circumstances here. That case involved the exclusion of a dramatic production from a municipal auditorium that otherwise would have been empty, solely on the ground that the production would violate obscenity laws. 420 U.S. at 548. The Court held that the city had to comply with the procedural safeguards ordinarily applicable to determinations that artistic productions are obscene. *Id.* at 559-561. The case did not involve the allocation of scarce space among competing uses, and did not address the question whether the necessity of seeking advance approval for use of government facilities affected the prior restraint analysis; to the contrary, the Court has since left open the question — analogous to the one in this case — "whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary

right to select performances and control their quality." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989) (citing *Southeastern Promotions*, 420 U.S. at 570-574 (Rehnquist, J., dissenting)). *Southeastern Promotions* accordingly has no application here.

If read broadly — as the Second Circuit did — to impose strict scrutiny and prior restraint procedures on the government whenever it selects among potential speakers in government fora, *Southeastern Promotions* is in considerable tension with modern precedents. See, *e.g.*, *Forbes*, slip op. 6 ("Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to journalistic discretion"). It is difficult to see why the selection of a play to be performed in a municipal theater would stand on a different footing than selection of a speaker for a government-sponsored lecture series or of programming for a government-owned television station. The Second Circuit's decision in this case shows that *Southeastern Promotions* is a source of misunderstanding and mischief in the law. This case would give the Court the opportunity to explain and confine the holding of *Southeastern Promotions*.

3. Finally, the extraordinary practical implications of the decision below — in both its public forum and prior restraint aspects — bear emphasis. *First*, the Second Circuit's holding may require the MTA to display advertisements that the Authority reasonably regards as harmful. Indeed, the MTA developed the Advertising Standards precisely because advertisers sought to display messages (such as ones promoting tobacco products or depicting persons who appeared to be minors in sexually provocative poses) that are, quite understandably, upsetting to the MTA's passengers and detrimental to its primary mission of providing safe and efficient transportation in pleasant surroundings. The MTA should not be forced to impose on its riders — a captive audience, including thousands of children — whatever messages advertisers may wish to disseminate. Privately owned companies regularly exercise discretion in such matters, in the interest both

of their customers and of themselves; after all, riders who are offended by what they see will avoid the forum altogether. See *Kokinda*, 497 U.S. at 736 (plurality opinion). There is no reason public transit has to be turned into a no-holds-barred pit of frightening, offensive, degrading, unhealthful, or illegal images. Yet if the exclusion of inappropriate advertisements is subjected to strict scrutiny, such images can be expected to reappear in New York's trains and buses, and in facilities owned by other public agencies that are subject to the Second Circuit's rule.

Second, the court of appeals' holding, which effectively forbids advance determinations of who may purchase advertising space on MTA transit facilities (or, what is practically the same thing, which requires judicial proceedings prior to such determinations) — and which mandates that any exclusion of advertising survive the rigors of strict scrutiny — essentially renders any system of advertising regulation impossible. Every year, the MTA's advertising contractor must process hundreds of proposed advertisements, many of which run for only relatively brief periods. The expense of instituting judicial proceedings whenever a proposed advertisement is inconsistent with the Advertising Standards would make enforcement prohibitively burdensome. The MTA might well be forced to stop carrying political messages so as to shed its character as a public forum, an outcome that surely does not advance First Amendment values.

Third, no public transportation agency in the country operates in the manner now required by the Second Circuit. In one stroke, the court of appeals rendered unconstitutional the standard operating practices of virtually every agency in the Circuit — and if followed by other courts, in the country. Modern transit systems typically accept political or other arguably controversial noncommercial advertising, and under the decision below all such facilities are now unlimited public fora. At the same time, all of these transit systems exclude certain categories of offensive advertisements. If the Second Circuit is right, all must now either forgo their political advertising, or operate under the regime of prior restraints and strict scrutiny announced by the court of appeals. If the Constitution requires such a massive disruption of settled government practices, it should be this Court, and not a divided panel of the court of appeals, that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

NEW YORK MAGAZINE, A DIVISION OF PRIMEDIA MAGAZINES, INC.,
Plaintiff-Appellee,

v.

The METROPOLITAN TRANSPORTATION AUTHORITY and The City of New York,
Defendants-Appellants.

No. 1645, Dockets 97-9511, 97-9519.

United States Court of Appeals,
Second Circuit

Argued Dec. 15, 1997.

Decided Jan. 22, 1998.

Before: OAKES, CARDAMONE and CALABRESI, JJ.

OAKES, Senior Circuit Judge:

This case presents the question whether the Metropolitan Transportation Authority ["MTA"], a public benefit corporation created by the State of New York, may refuse to display on its buses an advertisement that refers by first name to the Mayor of New York City, based on MTA's belief that the advertisement violates § 50 of the New York Civil Rights Law. Plaintiff New York Magazine, a division of Primedia Magazines, Inc. [collectively, "New York Magazine"], brought suit requesting preliminary and permanent injunctive relief against defendants MTA and the City of New York [the "City"], claiming defendants violated New York Magazine's rights as secured by the First and Fourteenth Amendments to the U.S. Constitution, after MTA discontinued displaying its advertisement [the "Advertisement"]. New York Magazine also requested preliminary injunctive relief against the City for tortious interference with contract. The Advertisement featured the New York Magazine logo and read, "Possibly the only good thing in New York Rudy hasn't taken credit for." New York Magazine had contracted with MTA's agent to have the Advertisement placed on the outside of MTA buses;

MTA removed the Advertisement from its buses after receiving a complaint from the Mayor's office that the Advertisement violated the Mayor's rights under § 50. The U.S. District Court for the Southern District of New York, Shira A. Scheindlin, Judge, granted Plaintiff New York Magazine preliminary injunctive relief on its claim brought under 42 U.S.C. § 1983, enjoining the defendants from refusing to display the Advertisement, finding that New York Magazine showed a substantial likelihood of success on the merits of its claim that MTA violated its rights under the First and Fourteenth Amendments to the U.S. Constitution. Both defendants appeal, claiming that the advertising space at issue constitutes a non-public forum, so that the MTA's action of discontinuing the Advertisement need only be reasonable, non-discriminatory and not based on the viewpoint expressed. They also argue that the District Court misapplied the test applicable to commercial speech in a designated public forum, because the governmental interest that justifies discontinuing the Advertisement, obeying § 50 of the New York Civil Rights Law, is substantial, and because refusing to display the Advertisement directly advances the governmental interest without being more extensive than necessary to serve that interest. We affirm the district court's order granting preliminary injunctive relief against MTA, but we vacate the order to the extent it applies to the City, and dismiss New York Magazine's claims against the City as failing to present a case or controversy.

I. Facts

The parties do not dispute the material facts. New York Magazine, a weekly publication distributed throughout New York City and elsewhere, regularly and frequently carries news reports and political commentary regarding the City of New York, its politicians, and other public figures, as well as other features and stories of general interest. MTA is a public benefit corporation created in 1965 by New York state law that owns and operates the majority of the public buses in New York providing daily local transportation. MTA raises revenue for its operation, in part, by leasing advertising space on the buses; it solicits advertisers and enters into contractual agreements for lease of its advertising space through an agent, Transportation Displays Incorporated ["TDI"]. In September of 1997, TDI, on behalf of MTA, and New York Magazine entered into a contract [the "Agreement"]. MTA agreed

to display the Advertisement, as part of a series of three, on the sides of seventy-five of its buses, and New York Magazine agreed to pay $85,000 for the series. The Advertisement was to run from just before Thanksgiving to December 31, 1997, and possibly for some time during January, 1998. The Agreement provided that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character [and] text...." New York Magazine agreed to "indemnify and save harmless TDI and [MTA] against any liability to which [they] may be subjected by reason of the advertising required under this contract."

New York Magazine provided TDI seventy-five copies of the Advertisement before November 15, 1997, in accordance with the Agreement. Neither TDI nor MTA objected to the Advertisement at that time, and MTA began posting the Advertisement around November 24, 1997, according to schedule. At some point in the following week, Mayor Giuliani's office called the MTA and asked that the Advertisement be removed, objecting to the use of the Mayor's name to promote a commercial product, claiming this violated § 50 of the New York Civil Rights Law. Section 50 provides, "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, ... is guilty of a misdemeanor." N.Y.Civ.Rights Law § 50 (McKinney 1997). Section 51 provides that "[a]ny person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without ... written consent ... may maintain an equitable action in the supreme court of this state against the [party] so using his name, portrait or picture ... and may also sue and recover damages for any injuries sustained by reason of such use...." *Id.* § 51 (footnote omitted). The statute provides that the jury may award exemplary damages in its discretion if the defendant violated § 50 knowingly. *Id.*

MTA adopted standards governing its acceptance of advertising by a board resolution dated March 24, 1994, and amended those

standards effective September 30, 1997 [the "Standards"].[1] The Standards impose no restriction on political speech. The Standards prohibit, inter alia, the display of any advertisement that "violates New York Civil Rights Law § 50." Standards § (a)(vii) (1994). The Standards also set forth procedures by which advertisements may be reviewed for compliance, requiring the MTA contractor (here, TDI) to review every advertisement to determine whether it falls within a prohibited category. If the contractor believes a submitted advertisement violates the Standards, the contractor is required to provide the advertiser with a copy of the Standards and notify the advertiser that the advertisement has been determined to violate the Standards, the reasons for that determination, and that the advertiser has a right to request a prompt review. *Id.* § (c)(i) (amended 1997). MTA concedes that TDI failed to follow these procedures with respect to the Advertisement.

The district court granted New York Magazine the preliminary injunctive relief it requested after consideration of exhibits and memoranda of law from all of the parties, and after conducting a hearing, which consisted of argument from all counsel. MTA and the City moved for a stay pending appeal of this action, which was denied, both in the district court and in this court.

II. Discussion

A. Standard of review

We review the district court's grant of a preliminary injunction for abuse of discretion, although we review its determinations of law de novo. *Malkentzos v. DeBuono*, 102 F.3d 50, 54 (2d Cir.1996); *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir.1994). If the District Court has based its decision on an error of law, it has ipso facto abused its discretion. *Cheney*, 12 F.3d at 11; *see* Henry J. Friendly, INDISCRETION ABOUT DISCRETION, 31 Emory L.J. 747, 776-78 (1982).

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[1] The district court noted that the parties disputed whether the 1997 amendments to the regulations applied to the Agreement, which was executed before the effective date of the 1997 amendments. We do not need to decide the issue, because our decision does not depend on whether the amendments applied.

B. Standing against the City

The district court denied New York Magazine's motion for preliminary injunction with respect to its claim against the City for tortious interference with contract, and New York Magazine claims no error with respect to that denial. The district court issued its injunction for New York Magazine's claim under § 1983 against both defendants: "Defendants are enjoined and restrained from refusing to display, or restricting or limiting the display of Primedia's advertisements on [MTA] buses pursuant to its December, 1997 contract with TDI." *New York Magazine v. Metropolitan Transit Auth.*, No. 97 CIV. 8792(SAS), 1997 WL 738610, at *16, — F.Supp. ——, —— (S.D.N.Y. Dec. 1, 1997) (order granting preliminary injunction). However, *New York Magazine* lacks standing to assert a claim against the City for injunctive relief. Article III of the U.S. Constitution requires that a "case" or "controversy" be present in order to confer jurisdiction on federal courts for a particular claim; standing to sue is an essential part of that requirement. *See Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975). Even assuming that the City, acting through the office of the Mayor, violated *New York Magazine's* rights under the First Amendment by contacting MTA and asking that the Advertisement be removed, *New York Magazine* does not have standing to request injunctive relief against the City. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the Supreme Court held that a plaintiff who may have been illegally choked by police, who would have had standing to state a claim for damages, did not have standing to seek injunctive relief against the police. *Id.* at 110, 103 S.Ct. at 1669-70; *see also Levin v. Harleston*, 966 F.2d 85, 90 (2d Cir.1992). In *Lyons*, the fact "[t]hat Lyons may have been illegally choked by the police ..., while presumably affording *Lyons* standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped ... by an officer or officers who would illegally choke him...." *Lyons*, 461 U.S. at 105, 103 S.Ct. at 1667. The Mayor's office has informed MTA of its feelings about the Advertisement; *New York Magazine* has not alleged any continuing action by the City, nor any real and immediate threat that the

Mayor's office will do anything further to interfere with MTA's display of the Advertisement.

Because *New York Magazine's* complaint against the City seeks injunctive relief only, we vacate the district court's order to the extent it applies to the City, and dismiss *New York Magazine's* claim against the City.

C. Standard for granting a preliminary injunction

MTA claims it took its action pursuant to the Standards. Where a party seeks a preliminary injunction to stay "government action taken in the public interest pursuant to a statutory or regulatory scheme," that party must show a likelihood of success on the merits and irreparable harm. *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996) (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir.1995)). The district court required *New York Magazine* to show not only a likelihood, but a "clear" or "substantial" likelihood, of success on the merits, reasoning that the order requested by *New York Magazine* is a mandatory injunction, one that seeks to alter, rather than maintain, the status quo. *New York Magazine*, 1997 WL 738610, at *3, — F.Supp. at —— (citing Jolly, 76 F.3d at 473). We do not need to decide whether the district court correctly held *New York Magazine* to the standard appropriate for mandatory, as opposed to prohibitive, injunctions, because *New York Magazine* meets the more stringent requirement. As for irreparable harm, the district court noted that if *New York Magazine* were correct as a matter of law that MTA's action unlawfully abridged its freedom of speech as guaranteed by the First Amendment, *New York Magazine* established irreparable harm. The " 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir.1988) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976)). As the district court correctly found that the facts presented constitute a violation of New York Magazine's First Amendment freedoms, *New York Magazine* established a fortiori both irreparable injury and a substantial likelihood of success on the merits.

D. The First Amendment

To state a claim under 42 U.S.C. § 1983, "a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States." *Eagleston v. Guido*, 41 F.3d 865, 876 (2d Cir.1994) (quoting *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir.1993)). MTA does not argue that the district court erred in determining that it qualifies as a person acting under color of state law for purposes of § 1983. Therefore, the only question presented is whether MTA's conduct in removing the Advertisement from the exterior advertising space of the its buses deprived *New York Magazine* of a First Amendment right.

The district court determined that the Advertisement, although it contained political commentary, constitutes commercial speech. *New York Magazine*, 1997 WL 738610, at *7, — F.Supp. at ——. It then determined that the advertising space at issue is a designated public forum, so that restrictions upon speech made there must be subject to the strictest available scrutiny for the kind of speech at issue. *Id.* at *10, at ——. The district court then applied the test dictated by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980), and found that the government interest in upholding § 50 was not directly advanced by discontinuing the Advertisement, because § 50 would not actually prohibit the Advertisement. *New York Magazine*, 1997 WL 738610, at *14. — F.Supp. at ——.

MTA argues that the district court erred in analyzing its determination to discontinue the Advertisement under the standard appropriate to commercial speech made in a designated public forum. It argues that the outside of an MTA bus actually constitutes a non-public forum, so that we should only require that MTA's action be reasonable, non-discriminatory, and not based on the speaker's viewpoint.

1. The Forum

Where the government seeks to restrict speech by restricting access to its own property, as it does here, the kind of scrutiny to which we subject the restriction depends on how we categorize the property as a forum for speech. *See International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992); *United States v. Kokinda*, 497 U.S. 720, 726, 110 S.Ct. 3115, 3119, 111 L.Ed.2d 571 (1990) (plurality opinion); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 944-955, 74 L.Ed.2d 794 (1983); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974). The Supreme Court has created three categories of government property, and announced standards for reviewing government restriction of speech according to those categories. *See Perry*, 460 U.S. at 45-46, 103 S.Ct. at 954-55. A traditional public forum is one that " 'by long tradition or by government fiat ha[s] been devoted to assembly and debate.'" *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 278 (2d Cir.1997) (quoting Cornelius, 473 U.S. at 802, 105 S.Ct. at 3449 (internal citation omitted)). The second kind of public forum is the designated public forum, a place the government has opened for use by the public for expressive activity. Id. at 278-79 (citing *Perry*, 460 U.S. at 45, 103 S.Ct. at 955). In both traditional public fora and designated public fora, content-based regulations survive only if "narrowly drawn to achieve a compelling [governmental] interest." *Id.* at 278 (citing *Lee*, 505 U.S. at 678, 112 S.Ct. at 2705). All remaining government property constitutes a non-public forum. The government may limit speech in a non-public forum if the limitation is reasonable, and not based on the speaker's viewpoint. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955; *Lee*, 505 U.S. at 678-79, 112 S.Ct. at 2705.[2]

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[2] The Second Circuit has referred to the "limited public forum" as a sub-category of the designated public forum, where the government "opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir.1991); *see Deeper Life*,

[11] No one in this case argues that the advertising space at issue is a traditional public forum; *New York Magazine* argues it is a designated public forum, and MTA and the City both argue the space is a non-public forum. The Court has made it clear that whether government property is designated a public forum or not depends on the government's intended purpose for the property. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449. In order to determine the government's intention with respect to property in which the government has accepted some speech, the Court has examined the nature of the property and its compatibility with expressive activity, as well as the nature of the restraints on speech imposed. *Id.* at 802-04, 105 S.Ct. at 3449-3451.

In determining the nature of the property, the Court has examined whether the government opened the property for speech in its "proprietary capacity," for the purpose of raising revenue or facilitating the conduct of its own internal business; if so, the Court has considered the forum non-public and allowed restrictions subject only to the test of reasonableness. *See Lehman*, 418 U.S. at 303, 94 S.Ct. at 2717 ("Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce."); *Lee*, 505 U.S. at 678, 112 S.Ct. at 2705 ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."). In *Cornelius*, the Court found that the government had not designated the Combined Federal Campaign, a charity drive aimed at federal employees, to be a public forum because the purpose of its creation had been to minimize disruption of business "by lessening the amount of expressive activity occurring on federal

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852 F.2d at 679-80. Exclusions of speech under this category are treated the same as exclusions under non-public fora: "Under the limited public forum analysis, ... exclusion of uses ... need only be reasonable and viewpoint-neutral to pass constitutional muster." *Id.* (citations omitted); *see also Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir.1996).

property." 473 U.S. at 805, 105 S.Ct. at 3450. The government acted in its capacity as an employer to make its workplace more efficient; the point had been not to encourage speech, but to reduce the amount of speech that had been taking place on government property. In *Perry*, the Court determined that public school mail facilities did not constitute a designated public forum where the "'normal and intended function [of the school mail facilities] is to facilitate internal communication of school-related matters to the teachers.'" *Perry*, 460 U.S. at 47, 103 S.Ct. at 955 (alternation in original) (citation omitted). Where the government acted for the purpose of benefitting the public, on the other hand, the Court has found a public forum. *See Widmar v. Vincent*, 454 U.S. 263, 267-69, 102 S.Ct. 269, 273-74, 70 L.Ed.2d 440 (1981) (finding that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975) (finding a designated public forum where the city leased a theater dedicated to expressive activities).

In determining the government's intent for a forum, the Court has examined not only the characteristics of the forum, but also the policies by which it governed the use of the forum. *See Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450. MTA argues that restricting access to the forum through its Standards evidences an intent not to create a public forum. *See Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 937 F.Supp. 425, 431 (E.D.Pa.1996) (finding that subway advertising space was not a public forum, noting that the transportation authority "presented ample evidence that it retains firm control over the types of advertising which may be displayed in its stations. It has rules and standards."). However, it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content. *See Cornelius*, 473 U.S. at 813-814, 105 S.Ct. at 3455

(Blackmun, J. dissenting). We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to designated public fora.

Although the Court undeniably has considered excluded categories of speech when deciding whether the government intended to designate a public forum, it did so not because the exclusion of categories of speech creates a non-public forum, but because the nature of the excluded categories sheds light on whether the government was acting primarily as a proprietor or a regulator. "The decision of the Government to limit access to the [forum] is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum." *Id.* at 805, 105 S.Ct. at 3450. In *Lehman*, the Court found the exclusion of political advertising not to determine the nature of the forum, but to support its determination that the government was acting in a proprietary capacity: "Revenue earned from long- term commercial advertising could be jeopardized by a requirement that short- term candidacy or issue-oriented advertisements be displayed on car cards." *Lehman*, 418 U.S. at 304, 94 S.Ct. at 2718. In *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650, 656-57 (2d Cir.), amended by 89 F.3d 39 (2d Cir.1995), we considered the consistent exclusion of political speech from a particular billboard space in Penn Station not to prove that we should only demand of that exclusion that it be reasonable, but to prove that the government opened the space in its capacity as a commercial actor. Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice. The district court thus correctly found that the advertising space on the outside of MTA buses is a designated public forum, because the MTA accepts both political and commercial advertising. *See Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir.1991) (finding designated public forum where the government "failed to demonstrate a consistent practice of limiting noncommercial, expressive activity"); *Lebron v. Washington Metropolitan Area Transit Auth. ("WMATA")*, 749 F.2d

893, 896 (D.C.Cir.1984) ("There is no ... question that WMATA has converted its subway stations into public fora by accepting ... political advertising.").

Not only do MTA Standards permit political and other non-commercial advertising generally, the Standard by which MTA attempts to justify refusing to show the Advertisement supports the conclusion that MTA was operating in its capacity as a regulatory agency when it did so. Unlike the exclusions that contributed to orderly internal business procedures in Perry or Cornelius, the MTA's exclusion is based on a general interest in upholding the law, and a corollary interest in avoiding litigation. The MTA articulates its interest as "seeing to it that commercial advertising appearing on its buses complies with Section 50, the statutory codification of the[ ] rights [of privacy and publicity.]" There is no commercial reason why MTA has any special interest in the policy behind § 50; MTA's interest is only the interest in upholding the law because it is the law.[3]

Given that MTA's Standards allow both commercial and political speech, and given that the Standard that MTA used to justify discontinuing the Advertisement supports a legal characterization of MTA's action as regulatory, we conclude that the advertising space on the outside of MTA buses is a designated public forum.

2. Prior Restraint

Having determined that MTA intended to designate its advertising space as a public forum, we review MTA's actions, which it took pursuant to regulations, as an exercise of a prior restraint. *See Southeastern Promotions*, 420 U.S. at 552-57, 95 S.Ct. at 1243-46; *Lebron v. WMATA*, 749 F.2d at 896 (having determined that the WMATA had designated its subway stations as public fora, reasoned that "[b]ecause WMATA, a government agency, tried to prevent Mr. Lebron from exhibiting his poster 'in

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[3] Although the interest in avoiding litigation could be characterized as commercial, the indemnity clause of the Agreement, which provides that the advertiser bears full liability for any damages incurred in litigation, fully protects that interest, as we discuss below.

advance of actual expression,' WMATA's action can be characterized as a 'prior restraint,' which comes before us bearing a presumption of unconstitutionality") (internal citations omitted). "In order to be held lawful, [the government agency's] action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, must have been accomplished with procedural safeguards that reduce the dangers of suppressing constitutionally protected speech." *Southeastern Promotions*, 420 U.S. at 559, 95 S.Ct. at 1247 (citing *Bantam Books v. Sullivan*, 372 U.S. 58, 71, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963)). These safeguards require, inter alia, that "the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor," and that "a prompt final judicial determination must be assured." *Id.* at 560, 95 S.Ct. at 1247.

Although the Supreme Court has indicated that commercial speech may qualify as one of the exceptions to the bar on prior restraints, *see Central Hudson*, 447 U.S. at 571 n. 13, 100 S.Ct. at 2354 n. 13, we see no reason why the requirement of procedural safeguards should be relaxed whether speech is commercial or not. We consider prior restraints to be particularly abhorrent to the First Amendment in part because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary. Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, § 12-38, at 1056- 57 (2d ed. 1988). This case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City's government on an issue relevant to his performance of office, subtly calling into question whether the Mayor is actually responsible for the successes of the City for which he claims credit. While we accord somewhat lowered scrutiny to government restrictions on the right to propose commercial transactions, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n. 24, 96 S.Ct. 1817, 1830 n. 24, 48 L.Ed.2d 346 (1976), protecting the right to express skeptical attitudes toward the

government ranks among the First Amendment's most important functions. *See* James L. Oakes, THE DOCTRINE OF PRIOR RESTRAINT SINCE THE PENTAGON PAPERS, 15 U.Mich.J.L.Reform 497, 499 (1982) ("[T]he doctrine of prior restraint has promoted responsibility in government by ensuring that the Government does not suppress exposure of its errors, deceptions, or embarrassments."). We need not decide whether the Advertisement is actually commercial speech or core-protected speech; the difficulty of the question alone convinces us that the requirement of procedural safeguards in a system of prior restraints should not be loosened even in the context of commercial speech. "Because the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one, the 'separation of legitimate from illegitimate speech calls for ... sensitive tools.'" *Southeastern Promotions*, 420 U.S. at 561, 95 S.Ct. at 1248 (quoting *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)). Some circuits have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech. *See, e.g., Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir.1996); *In re Search of Kitty's East*, 905 F.2d 1367, 1371-72 & n. 4 (10th Cir.1990).

In fact, the test that the Supreme Court regularly applies to commercial speech supports continuing to require procedural safeguards for prior restraints even where commercial speech is involved. *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. That test requires us to consider "whether the regulation ... is not more extensive than is necessary to serve [the asserted governmental] interest." *Id.* If it is more extensive than necessary, the government's action fails. A prior prohibition of the Advertisement is certainly more extensive than is necessary to serve the governmental interest asserted here, particularly where this court found, when denying MTA's motion for a stay, that requiring MTA to display the Advertisement would not result in irreparable harm to MTA. In other words, we have already decided that applying § 50 before the Advertisement is displayed is more extensive than necessary. Because the advertising space is a designated public forum, MTA may not enforce § 50 through its advertising policy any more than a government agency, acting without procedural

safeguards, could screen advertisements for violations of § 50 that private bus companies wished to display. Section 51 already provides remedies for violation of § 50, which may be asserted by the person who feels his rights are affected. If § 50 does protect Mayor Giuliani from the use of his name in this Advertisement, he may seek redress under § 51; he will not be awarded injunctive relief absent a showing that he will be irreparably harmed without it. Refusing to display the Advertisement is also more extensive than necessary to further MTA's corollary interest in avoiding litigation; that interest is adequately furthered by the indemnity clause of the Agreement. In fact, in pursuit of the interest in avoiding litigation, it is clear that MTA would have been wise to rely on its indemnity clause, seeing that we write precisely because imposing a prior restraint has failed to further that interest.

III. Conclusion

For these reasons, we affirm the district court's grant of preliminary injunctive relief against MTA.

CARDAMONE, Circuit Judge, Dissenting:

My respected colleagues have circled the wagons on this appeal, seeing the government regulators as though they were a long line of raiders poised on a nearby hilltop threatening to swoop down and attack innocent advertisers attempting to exercise their constitutional right to free speech. The appeal appears to me in a much less menacing light. Seeing no arrow aimed at the heart of the First Amendment, I must respectfully dissent. Stripped of the baggage of its highly-visible parties, this case simply involves commercial speech in a forum where the MTA's regulations may properly and did reasonably regulate such speech.

The MTA's 1994 advertising standards, which are the subject of this appeal, contain eight limitations on what an advertiser may display on MTA buses. Such advertisement may not: (i) be false, misleading or deceptive, (ii) promote unlawful or illegal goods or services, (iii) imply an endorsement by the MTA of the product or service, (iv) contain obscene material, as defined by New York Penal Law § 235.00, (v) contain an image or description which if sold to a minor would violate New York Penal Law § 235.21, (vi) contain an image or description that would violate New York Penal

Law § 245.11, (vii) be libelous or violate New York Civil Rights Law, § 50, and (viii) promote tobacco.

I

New York Magazine's advertisement plainly violates § 50 of New York's Civil Rights Law. Section 50, which has been law in New York for 95 years, makes it a misdemeanor to use, "for advertising purposes or for the purposes of trade, the name, portrait or picture of any living person" without first obtaining that person's written consent. N.Y.Civ.Rights Law § 50 (McKinney 1992); *see Groden v. Random House, Inc.*, 61 F.3d 1045, 1048 (2d Cir.1995). Section 51 of the New York Civil Rights Law provides those injured by such conduct with a cause of action for injunctive relief and damages. *See* N.Y.Civ.Rights Law § 51 (McKinney Supp.1997-98). Since no common law right to privacy exists in New York, this statute is the only protection individual citizens have against non-consensual invasion of that right. *See Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 497 n. 2, 410 N.Y.S.2d 282, 382 N.E.2d 1145 (1978); *see also Arrington v. New York Times Co.*, 55 N.Y.2d 433, 440, 449 N.Y.S.2d 941, 434 N.E.2d 1319 (1982). No one disputes that the use of Mayor Giuliani's name in the subject advertisement was without his consent.

An appropriation of a person's name, portrait or picture violates § 50 only if it is used primarily for trade or advertising purposes. *See Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 140, 490 N.Y.S.2d 735, 480 N.E.2d 349 (1985). The advertising purposes prong of the statute is implicated where the use of a person's name is for the purpose of soliciting purchasers for defendant's products. *See, e.g., Flores v. Mosler Safe Co.*, 7 N.Y.2d 276, 284, 196 N.Y.S.2d 975, 164 N.E.2d 853 (1959) (holding that defendant safe company which reprinted in advertising circular a newsphoto of a burning building and accompanying news story mentioning plaintiff's name several times could be held liable for such advertising use). New York Magazine made use of the name of New York City's Mayor primarily to attract readers to buy its product. Thus, on its face, § 50 applies. Moreover, the fact that the Mayor is a public figure does not alter this conclusion, for § 50 covers public, as well as private, figures. *See Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 183, 485 N.Y.S.2d 220,

474 N.E.2d 580 (1984); *Brinkley v. Casablancas*, 80 A.D.2d 428, 439-41, 438 N.Y.S.2d 1004 (1st Dep't 1981); *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 614-15, 472 N.Y.S.2d 254 (Sup.Ct.N.Y.County 1984), aff'd, 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dep't 1985).

In addition, the two exceptions to § 50's application, incidental use and public interest, have no application here. The incidental use exception is for fleeting, de minimis, uses. *See, e.g., University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 454, 256 N.Y.S.2d 301 (1st Dep't) (plaintiff named on three pages of 143 page book), aff'd, 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965). This exception does not apply because, as New York Magazine admits, the reference to the Mayor is central, not incidental, to the advertisement and its commercial impact.

Nor does the public interest exception govern. That exception does not apply to materials that are "quintessential" advertising. *See Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 751-53, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991) (holding that a commercial advertiser may not unilaterally override significant statutory privacy protection by wrapping its message in the cloak of public interest, however commendable that message's educational and informational value). Nor is it relevant, as *New York Magazine* contends, that the advertisement is satire. *See Onassis*, 122 Misc.2d at 614-15, 472 N.Y.S.2d 254. Although the media is of course entitled to direct humor or satire at a public figure in non-advertising contexts, the unauthorized use of an individual's name in an advertisement is not rendered lawful merely by the addition of humorous social commentary. See id. Hence, because neither the incidental use nor public interest exception applies, and no consent was obtained from the person whose name was used, § 50 of the New York Civil Rights Law was violated by this advertisement.

II

Whether the City of New York can limit access to its property — here a city bus — for purposes of speech depends on the nature of the forum. Restrictions on speech on governmental property traditionally open to the public, like public streets and parks, are

subject to strict scrutiny. But a city bus cannot be said to be a quintessential public forum in the same sense as a park or public street.

The MTA operates its bus system as a commercial venture. Thus, this function of government is not conducted in the authority's role of lawmaker, but rather in a proprietary capacity. As such, the transit system has the power to develop reasonable regulations with respect to what kinds of advertising it will accept. *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678-83, 112 S.Ct. 2701, 2705-08, 120 L.Ed.2d 541 (1992) (reasoning that because airport terminals operated by public authorities are commercial establishments, restrictions imposed on expression within them are satisfied by the requirement of reasonableness). And, even when a public authority opens a forum to some speech, it does not become a public forum unless the authority clearly intends it to be one. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 804, 105 S.Ct. 3439, 3450, 87 L.Ed.2d 567 (1985).

Here, since the MTA does accept some political advertising, it must be conceded that City buses are in fact dedicated to some First Amendment uses. However, the City signalled its intent that the sides of buses were not to be considered public fora through its regulations, which, among other things, ban advertising that violates § 50 of the New York Civil Rights Law. *See Cornelius*, 473 U.S. at 805, 105 S.Ct. at 3450 ("The decision of the Government to limit access to the [forum] ... is relevant for what it suggests about the Government's intent in creating the forum.").

It is my belief that the sides of MTA buses are a limited public forum that permit some forms of political speech. *See Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir.1991) ("[I]n a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."). That does not mean, as the majority apparently believes, that the test of strict scrutiny applies across the board to restrictions on non-political commercial advertising of the kind we have before us. Although bus placards have been dedicated to some First Amendment uses, and may not

therefore be said to be a purely nonpublic forum, "regulation of the reserved nonpublic uses would still require application of the reasonableness test." *United States v. Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 3121, 111 L.Ed.2d 571 (1990); *see also Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 47-49, 103 S.Ct. 948, 956-57, 74 L.Ed.2d 794 (1983).

III

In 1994 the MTA promulgated the written advertising standards referred to above, clearly evincing its intent not to open its advertising space to all comers. In *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), the Supreme Court explained that billboards and streetcar signs are thrust upon viewers without their choice — a radio or TV can be turned off, not so a billboard or bus placard. *Id.* at 302, 94 S.Ct. at 2716-17. When a City is engaged in commerce, the Court continued, it need not accept every advertisement offered, but may make reasonable choices with respect to the advertising displayed on its vehicles. *Id.* at 303, 94 S.Ct. at 2717. Such is precisely the situation in the case before us.

Restrictions on expression "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451. The regulation excluding advertisements that violate New York Civil Rights Law § 50 is a reasonable exclusion, and one that is viewpoint neutral. The MTA declares that these regulations restricting speech serve two substantial governmental interests. The first is protecting the rights of privacy and publicity of the citizens of New York. As we recognized in *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 128-29 (2d Cir.1984), the unconsented use of a person's name for commercial purposes can inflict a kind of harm that mere disclaimer cannot heal. In *Lerman* we quoted language from an article co-authored by Justice Brandeis, which observed that "modern enterprise and invention have, through invasions upon [man's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." *Id.* at 129 (quoting S. Warren and L. Brandeis, THE RIGHT OF PRIVACY, 4 Harv.L.Rev. 193, 196 (1890)). Hence, a regulation restricting commercial

advertising on government-owned property is a reasonable means of protecting the ever-shrinking realm of individual privacy.

The second interest is to conduct its commercial activities in a manner that avoids violating state law and any consequent litigation. The majority thinks the violation of the State Civil Rights Law presents no problem because an indemnity agreement protects the MTA. But indemnity agreements are not self-executing, and a party's attempt to enforce their provisions often leads to extensive legal battles. In short, an indemnity agreement does not eliminate litigation.

As a consequence, having determined that the subject advertisement violates § 50 and that the MTA regulation survives the test of reasonableness, I conclude that plaintiff's First Amendment challenge must fail.

IV

Finally, the majority uses as some part of the rationale for its decision the notion that the MTA regulations constitute a prior restraint. It seems to me difficult to mount a prior restraint argument in the circumstances of this appeal when the "prior" element is absent. It must be remembered that the advertisement at issue had already appeared on the sides of City buses both before the MTA attempted to remove it and at the time we heard the appeal. *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (holding that municipal board's denial of use of a city- leased theater for the production of a musical, before anyone had seen it, constituted an illegal prior restraint).

CONCLUSION

My concern with the majority's conclusion in this case, simply stated, is that by affording the commercial speech at issue as much judicial protection as it has, it fails to distinguish between commercial and non-commercial speech. In so doing, the First Amendment guarantees that safeguard non-commercial speech are diluted, and all speech is thereby leveled at the lowest common denominator. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444 (1978).

Accordingly, I vote to reverse the district court's issuance of an injunction and would remand the case to that court with a direction that the motion for such relief be denied.

APPENDIX B

NEW YORK MAGAZINE, A DIVISION OF PRIMEDIA MAGAZINES INC.,
Plaintiff,

v.

The METROPOLITAN TRANSIT AUTHORITY and the City of New York,
Defendants.

No. 97 CIV. 8792 (SAS).

United States District Court,
S.D. New York.

Dec. 1, 1997.

OPINION AND ORDER

SCHEINDLIN, District Judge.

Who would have dreamed that the Mayor would object to more publicity? But that is what this case is all about. Our twice-elected Mayor, whose name is in every local newspaper on a daily basis, who is featured regularly on the cover of weekly magazines, who chooses to appear in drag on a well-known national TV show, and who many believe is considering a run for higher office, objects to his name appearing on the side of City buses. He staunchly asserts, through his designated officials, that he has a "right to publicity," namely the right to control the use of his name when it is used for advertising or trade purposes. However, one who has chosen to be Mayor, and therefore to be the subject of daily commentary and controversy, cannot avoid the limelight of publicity — good and bad. Because of the "incidental use" and "public importance" limitations on the right to publicity, the Mayor's assertion of his right must yield to the Plaintiff's assertion of its First Amendment right.

By the filing of a Complaint and Order to Show Cause, dated November 25, 1997, Plaintiff New York Magazine, a division of PRIMEDIA Magazines Inc. ("NY Magazine"), seeks a preliminary

injunction enjoining and restraining the Metropolitan Transit Authority ("MTA") and the City of New York ("City") from:

(i) restraining plaintiff PRIMEDIA's fundamental exercise of its right to free speech, guaranteed by the First Amendment to the United States Constitution by refusing to display, or restricting or limiting the display of any of PRIMEDIA's advertisements on city buses pursuant to PRIMEDIA's contract with defendant MTA; or

(ii) tortiously interfering with PRIMEDIA's contract with defendant MTA.

Order to Show Cause, dated November 25, 1997. The basis for this request is summarized in detail below. For sound bite purposes, however, suffice it to say that N.Y. Magazine contracted to display an advertisement ("Ad") on City buses featuring the New York Magazine logo and the following text:

> Possibly the only good thing in New York Rudy hasn't taken credit for

After the Ad had begun to run on city buses, New York's Mayor, Rudolph Giuliani ("Mayor," "Rudy" or "Giuliani"), requested Deputy Mayor Randy Mastro to notify the MTA that the Ad should be pulled because it violated his rights under Section 50 of the New York Civil Rights Law ("Section 50").[1] Needless to say, the Ad was immediately pulled. This lawsuit followed.

I. Factual and Procedural Background

New York Magazine is a weekly magazine, distributed and sold in the New York metropolitan area and elsewhere. The

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[1] Section 50 of the New York Civil Rights Law provides that:

> "A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person ... is guilty of a misdemeanor."

Section 51 of the New York Civil Rights Law allows a person to bring a suit to enjoin such use and to seek damages for any injuries sustained as a result of such use.

magazine includes news and political commentary regarding New York City, its public officials, public figures and politicians. Complaint at ¶ 4. The Mayor and his aides are covered in the magazine on a regular basis, sometimes in an unfavorable light. Id. at ¶ 13. The MTA is a public benefit corporation created in 1965. It owns and operates a majority of the buses that provide local transportation for hundreds of thousands of New Yorkers. Id. at ¶ 5. In addition to providing transportation, the MTA solicits advertisements, and contracts for their publication, through an entity known as Transportation Displays Incorporated ("TDI"). On September 11, 1997, TDI, acting on behalf of the MTA, entered into an agreement in which the MTA agreed to run a series of three advertisements by N.Y. Magazine on the sides of 150 City buses.[2] Id. at ¶ 9. The Ad in issue was to run on the side of 75 of the buses. Id. at ¶ 10. NY Magazine agreed to pay $85,000 for the advertising which was to run from just before Thanksgiving to December 31, 1997, with some possible January 1998 bonus time. Id. at ¶ 11.

The full size ads were submitted to TDI and the MTA prior to November 15. Id. at ¶ 12. According to an article appearing in The Daily News on Saturday, November 22, 1997, the Mayor asked Deputy Mayor Mastro to call the MTA and ask that the Ad be removed. Id. at Ex. A. According to an article in The New York Times, appearing on Sunday, November 23, 1997, the Ad had already appeared on eight buses by the time it was pulled. Id. at Ex. B. The article quoted Colleen A. Roche, the Mayor's press secretary, as stating, "[t]he objection was based on the use of [Giuliani's] name to promote a commercial product[.]" Id.

In support of its request for relief, plaintiff submitted an Affidavit from Beverly Chell ("Chell Aff."), PRIMEDIA's Vice Chairman and General Counsel. This Affidavit annexes the Complaint and the contract between Plaintiff and TDI. See Exhibits

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[2] The other two ads have the following text:

(1) "Police Brutality, School Reform, and the issue closest to most New Yorkers, how to get a table at Balthazar" and (2) "What people in L.A. read for a little culture and intellectual stimulation." Complaint at ¶ 10.

A and D to Chell Aff. The Terms and Conditions of the "Contract For: Transit Advertising, Bus Shelters, Phone Kiosk" provides that "all advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text ...." Id. at Exhibit A. Plaintiff also submitted a Memorandum of Law. In response, both the MTA and the City submitted Memoranda of Law, attaching, inter alia, the MTA Advertising Standards governing advertising and two advisory opinions of the City of New York's Conflicts of Interest Board. A preliminary injunction hearing was held on November 28, 1997. See Transcript of Argument ("Tr."). The hearing consisted of argument from all counsel. In addition, the plaintiff introduced the Ad in issue and the November 10, 1997 issue of New York Magazine, featuring a caricature of Mayor Giuliani on its cover and a cover story entitled "How Far Can Rudy Go?" Tr. at 75-76.

Plaintiff also made a proffer as to certain facts, which solely for the purposes of this application, are deemed to be true. The plaintiff's proffer states that (1) the Ad copy was submitted to TDI during the week of October 17 for pre-approval and was pre-approved, Tr. at 67, 75; (2) the actual physical posters of the Ads were received by the MTA on November 10, 1997, Tr. at 67, 75, although not necessarily by a person who exercised any control or authority, Tr. at 83; and (3) the November 10 issue of N.Y. Magazine was on the newsstands as of November 3, 1997 and was mailed to subscribers on that date. Tr. at 76.

By a Board Resolution dated March 25, 1994, the MTA Board adopted certain Advertising Standards. See Exhibit A to Defendant MTA's Memorandum of Law. It is unclear whether the 1994 Advertising Standards or a recent 1997 Amendment to those Standards govern this contract. As noted, the contract was dated September 11, 1997 (although it appears to have been executed by TDI on September 24). See Exhibit A to Chell Aff. The parties agree that the 1997 Amendments went into effect after the date of the contract. In any event, the 1994 Standards, as well as the 1997 Amendments, prohibit, inter alia, the display of any advertisement that "violates New York Civil Rights Law § 50." Id. at § (a)(vii). The 1994 Standards then establish a methodology for reviewing advertisements which requires the MTA advertising contractor (here TDI) to review every ad to determine if it falls within any

prohibited category. If it does, the contractor is required to provide the advertiser with a copy of the Standards and notice of the determination, the reasons for it, and to notify the advertiser of its right to request a prompt review. Id. at § (c)(i). The MTA concedes that these procedures were not followed in this case. Tr. at 58-59, 63 ("TDI blew it").

Finally, in two Advisory Opinions of the City's Conflicts of Interest Board, attached as Exhibits B and C to the City's Memorandum of Law, the Board opines that a public servant may not "allow his official title to be used to promote [a] book" and may not "promote[] ... the interests of a for-profit entity" even if the public servant donates the compensation for appearing in the advertisement to charity. The City offers these opinions as an additional justification for pulling the Ad. Tr. at 36.

The Complaint states three claims. The first claim, pled against both the City and the MTA, asserts that both entities violated Plaintiff's constitutional right to engage in free speech as guaranteed by the First Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983. The second claim, pled only against the City, asserts that it tortiously interfered with Plaintiff's contract with the MTA. Finally, the third claim, pled only against the MTA, asserts that it breached its contract with Plaintiff and is liable to Plaintiff for any damages it has sustained as a result of the breach. Plaintiff seeks a preliminary injunction based on the violation of its constitutional rights and the tortious interference with its contract.

II. Standard for Determining Whether a Preliminary Injunction is Warranted

Where a party seeks a preliminary injunction to stay "government action taken in the public interest pursuant to a statutory or regulatory scheme," the moving party must demonstrate irreparable harm and a likelihood of success on the merits. *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996) (quoting Able v. United States, 44 F.3d 128, 131 (2d Cir.1995)). A slightly higher standard applies where "the injunction sought 'will alter, rather than maintain, the status quo' — i.e., is properly characterized as a 'mandatory' rather than 'prohibitory' injunction." *Jolly*, 76 F.3d at 473 (quoting *Tom Doherty Assocs., Inc. v. Saban Entertainment,*

Inc., 60 F.3d 27, 33-34 (2d Cir.1995)). In such circumstances, the moving party must show a "clear" or "substantial" likelihood of success on the merits. *Id.* The distinction between mandatory and prohibitory injunctions is often elusive, however, and "cannot be drawn simply by reference to whether or not the status quo is to be maintained or upset," particularly where the parties may have different perspectives on what constitutes the status quo. *Id.* at 474 (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir.1985)).

Plaintiff seeks an order compelling the MTA to display the Ad in issue on 75 city-owned and operated buses. Complaint at ¶ 38. While at one time eight City buses were outfitted with the Ad, see Chell Aff. at ¶ 13, the MTA has since removed it from all MTA vehicles. The injunction sought here would therefore alter the status quo by requiring the MTA to outfit its buses with the Ad. Such a mandatory injunction requires that N.Y. Magazine prove a "clear" or "substantial" likelihood of success on the merits.

III. Section 1983 Constitutional Claim

A. Elements of a Section 1983 Claim

Section 1983 provides a civil action for the deprivation of constitutional rights under color of law. It provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

42 U.S.C. § 1983. To state a valid claim under § 1983, "a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Eagleston v. Guido*, 41 F.3d 865, 876 (2d Cir.1994) (quoting *Dwares v. City of New York*, 985 F.2d 94, 98 (2d Cir.1993)) (citations omitted). To prevail on a First Amendment claim under

Section 1983, Plaintiff must establish that (1) its "conduct is deserving of [F]irst [A]mendment protection" and that the Defendants' conduct "was motivated by or substantially caused by [plaintiff's] exercise of free speech." *Rattner v. Netburn*, 930 F.2d 204, 208 (2d Cir.1991) (quoting *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir.1987)).

B. Is a Preliminary Injunction Warranted?

As noted earlier, there are two requirements that must be satisfied before a preliminary injunction can be granted. The first requires a plaintiff to demonstrate that absent the requested relief, it will be irreparably harmed. It is beyond cavil that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir.1996). Generally, "[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary ." 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, § 2948.1 at 161 (2d ed.1995). Thus, the question presented here is whether Plaintiff can demonstrate a substantial likelihood of success on the merits.

The state action element of the Section 1983 claim is easily satisfied. The persons who allegedly deprived the Plaintiff of its First Amendment right were the City and the MTA, both governmental actors. Tr. at 4, 21. A governmental entity or subdivision is considered a person under Section 1983. *See Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978). The MTA concedes that it decided to pull the Ad based on the Giuliani Administration's interpretation of Section 50. Tr. at 46. As a result, there can be no question that it acted under color of state law. While the City refused to make the same concession, Tr. at 5, it too concedes that its Deputy Mayor acted in reliance on Section 50. Tr. at 35. The more difficult question, then, is whether the speech in issue is entitled to protection under the First Amendment. If it is entitled to protection, the next hurdle is to determine the

extent of that protection. I turn then to an analysis of the nature of the "speech" in which Plaintiff seeks to engage.

C. Is Plaintiff's Speech Protected by the First Amendment?

1. Is the Ad in Issue Commercial Speech?

The First Amendment is applicable to the states through the Fourteenth Amendment. *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966). It is therefore Plaintiff's Fourteenth Amendment rights that are alleged to have been violated by Defendants' state action. The analysis of the alleged violation remains the same—namely, whether Plaintiff's speech is protected by the First Amendment. Plaintiff claims that its right to convey its message was trampled by state actors for no legitimate reason, much less a substantial or compelling state interest. Plaintiff implies that the reason the Ad was pulled was because the Mayor did not like its content, i.e. the fact that it pokes fun at him for taking credit for all that is good in New York. Speech is generally protected unless it falls in a category that removes it from the scope of First Amendment protection, including, but not limited to, such categories as speech that infringes copyrights, is libelous, misleading or obscene, or violates a statute or regulation that serves a legitimate public interest. In order to determine the protection to be afforded to the speech in issue, it is necessary to decide whether it is entitled to full First Amendment protection or to the more limited protection accorded to what is known as "commercial speech."

Once upon a time commercial speech was "deemed wholly outside the purview of the First Amendment." *Penthouse Int'l, Ltd. v. Koch*, 599 F.Supp. 1338, 1344 (S.D.N.Y.1984) (citing *Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942)). Since 1976, however, the Supreme Court has consistently held that such speech is protected although it "is entitled to a lesser degree of protection than other forms of constitutionally guaranteed expression." *Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 859 F.Supp. 1521, 1536 (S.D.N.Y.1994) (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993); *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Central Hudson Gas & Elec. Corp. v.*

Public Serv. Comm'n of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). In the seminal case holding that commercial speech is entitled to an intermediate level of protection, the Supreme Court stated that, "[i]f there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62, 96 S.Ct. 1817, 1825-26, 48 L.Ed.2d 346 (1976).[3] Thus, speech that does no more than propose a commercial transaction is protected by the First Amendment. *Id.* at 762, 96 S.Ct. at 1826.

The question of whether the Ad in issue is commercial or noncommercial speech is not an easy one. The definition of commercial speech embraced by the Supreme Court is "speech that does no more than propose a commercial transaction." *Edge Broadcasting*, 509 U.S. at 426, 113 S.Ct. at 2703. However, in an opinion issued only two months earlier, the Court recognized "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419, 113 S.Ct. 1505, 1511, 123 L.Ed.2d 99 (1993). As noted in Gordon and Breach Science Publishers, supra, the fullest discussion of speech that contains elements of both commercial and noncommercial speech is found in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). That case involved the commercial solicitation for the sale of condoms. The unsolicited mailings sent by the manufacturer included both price and quantity information

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[3] Courts have recognized that commercial speech may be prohibited, for example, in the following circumstances: *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973) (regulating speech that proposes unlawful activities); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (regulating commercial speech to ensure that it is not coercive); and *Virginia State Bd. of Pharmacy*, 425 U.S. at 771- 72, 96 S.Ct. at 1830-31 (noting that speech that is false, deceptive or misleading may be regulated). There are many other examples of permissible restrictions on commercial speech.

but also included informational pamphlets. The Court found that these mailings were a hybrid of commercial solicitation and discussion of public issues. The Court proposed but rejected several bright-line tests to help it resolve the dilemma of categorizing the speech:

> The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech.

Bolger, 463 U.S. at 66-67, 103 S.Ct. at 2879-80 (citations and footnote omitted). While the Court found the issue to be a close one, it held that "[t]he combination of all these characteristics ... provides strong support for the ... conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67, 103 S.Ct. at 2880. The Court went on to note that:

> The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech.

Id. at 67-68, 103 S.Ct. at 2880-81 (citation and footnote omitted).

The Ad in issue is clearly a hybrid of commercial speech and political satire. Its central purpose is to advertise N.Y. Magazine and thereby encourage sales. However, the content of the Ad includes political satire — it pokes fun at the Mayor's alleged penchant for taking credit for all of New York's achievements. The question, then, is whether the inclusion of political satire in the motif of the Ad removes it from the category of commercial speech in which it would otherwise clearly fall. In hybrid or ambiguous situations, where there is admittedly no bright-line test, a court must attempt to discern the essence of the speech in order to determine whether the speech is commercial or fully protected. I must look

to the combination of all the characteristics to determine the essential nature of the speech. *See Bolger*, 463 U.S. at 67, 103 S.Ct. at 2880. For the following reasons, I conclude that the speech is essentially commercial in nature: (1) it is a paid advertisement; (2) it is not commenting on a current event, in that the Mayoral election was concluded several weeks before the Ad was to run; (3) while the Ad has an element of political satire, its primary purpose is commercial; and (4) N.Y. Magazine has a more appropriate forum, which it uses on a regular basis, to disseminate its views on the Mayor and his quirks.

In *Penthouse v. Koch*, *supra*, Judge Charles S. Haight of this Court reached a different conclusion with respect to a poster ad that Penthouse contracted to display in subway stations. The poster, advertising its June, 1984 issue, featured a caricature of presidential candidate Walter Mondale by political cartoonist Uri Hofmekler. "The figure, wearing a medallion labeled 'ERA Yes' around his neck, was portrayed as an almost nude male 'stripper', with female hands reaching up toward his unclothed thighs." *Penthouse*, 599 F.Supp. at 1341. In holding that the Penthouse poster involved political speech entitled to full First Amendment protection, Judge Haight concluded that:

> While the driving force behind Penthouse's lease of advertising space in the subway system and its display of the poster at issue was undoubtedly its desire to sell copies of the June issue of Penthouse magazine, the context in which Hofmekler's caricature appears — a paid commercial advertisement — does not deprive it of its political message and content.

Id. at 1345. The Penthouse case is surely factually similar to this one. Yet, there are certain distinguishing features that permit me to reach a different conclusion here. The most important distinction is that the speech in the Penthouse ad is a comment about a political position Vice-President Mondale was taking in the then current Presidential campaign: to wit, support for the ERA. By contrast, the speech in the Ad in issue is merely a comment on the political style of the Mayor. The Mondale caricature, appearing in any medium, would undoubtedly be viewed as political speech. The N.Y. Magazine Ad, wherever it appeared, would be viewed as

promoting N.Y. Magazine. The Penthouse ad is surely protected political speech; the N.Y. Magazine Ad falls in a grey area.[4]

The easiest analysis is to view various advertisements on a continuum from that which is unquestionably political speech to that which is undeniably commercial speech. At the political end of the spectrum is the ad discussed in Penthouse, in which the speaker/advertiser chooses to comment on the political position of a candidate in an election year. In the middle is the Ad in issue, in which the speaker/advertiser comments on the political style of a public official. At the opposite end of the spectrum is the hypothetical posed by counsel for the MTA during oral argument. He suggested an ad in which the speaker/advertiser says that the President should eat more of its low-fat foods than the junk food he clearly favors. Tr. at 50. To my mind, this is incontestably commercial speech because it makes no comment whatsoever on any political position or idiosyncrasy of the President's political style. As discussed above, it is the case in the middle, namely the case now before the Court, that is difficult to categorize. On balance, I believe that the Ad in issue fits more comfortably in the category of commercial speech rather than political speech.

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[4] Other distinctions might include: (1) the fact that the campaign was active at the time the Penthouse ad appeared but that there was no campaign at the time the Ad in issue was to run; (2) the dominant theme of Penthouse magazine is not political debate; thus the political statement was not directly related to the nature of the product being advertised. The opposite is true of the Ad in issue; and (3) the political viewpoint expressed by the Penthouse ad was not inextricably intertwined with the message of that ad. Here, the Ad in issue pokes fun at the Mayor for his style of claiming credit for all the good things that happen in New York, which is intertwined with the subject of the Ad, namely the political and social commentary for which N.Y. Magazine is known. This point gains support from a statement of Caroline Miller, N.Y. Magazine's editor in chief. "[E]ven though it was an advertisement, it expresses the tone and content of the magazine, which is that we cover the political life of the city with a very strong point of view and, more than occasionally, irreverence." New York Times, November 29, 1997, at B3.

2. The Standard for Protecting Commercial Speech

In *Central Hudson Gas*, 447 U.S. at 566, 100 S.Ct. at 2351, the Supreme Court created a test for determining whether governmental regulation of commercial speech violates the First Amendment.

> At the outset, we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This four-part test is still in effect today. *See, e.g., Edge Broadcasting*, 509 U.S. at 424, 113 S.Ct. at 2702. The only serious gloss added to this test was a holding that the fourth element does not require the government to show that it used the "least-restrictive-means" of advancing its interest. Rather, in *Bd. of Trustees v. Fox*, 492 U.S. at 469, 109 S.Ct. at 3029, the Supreme Court held that the regulation must be narrowly tailored to serve a substantial or important state interest.

> What our decision requires is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends," — a fit that is not necessarily perfect, but reasonable, that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served,"; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.

Id. at 480, 109 S.Ct. at 3034 (citations omitted) (emphasis added). It is the governmental entity (here the City), that has the "burden of establishing 'a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.'" *Discovery Network*, 507 U.S. at 414, 113 S.Ct. at 1508 (citations omitted). A recent summary of the test was written by Judge Pierre Leval:

> If the [commercial] speech passes that test [not misleading and relates to lawful activity], it is nonetheless subject to regulation if the government has a substantial interest in regulating the speech, the regulation directly advances that interest, and it is no more intrusive than necessary to accomplish its goal.

International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 77 (2d Cir.1996) (citation omitted) (emphasis added) (Leval, J., dissenting).

Thus, in the context of this case, the speech here is not misleading and it relates to lawful activity. It is nonetheless subject to regulation if the government has a substantial interest in regulating advertising and this regulation directly advances that interest. If the regulations cited in support of the government action, however, do not apply to this situation, then they cannot support an intrusion into Plaintiff's First Amendment rights.

D. Is the Exterior of a City Bus a Public Forum, a Designated Public Forum, a Limited Public Forum or a Nonpublic Forum?

Defendants argue that because the exterior of an MTA bus is a nonpublic forum (Tr. at 39) or a limited public forum (Tr. at 41), governmental action restricting speech in either of those forums "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992). *See also Lebron v. National R.R. Passenger Corp.*, 69 F.3d 650, 655 (2d Cir.1995). If they are right, this standard of review is more permissive than the standard of review accorded to restrictions on commercial speech. It is therefore necessary to decide in what type of forum the Ad in issue appears.

For purposes of the First Amendment's Free Speech Clause, the Supreme Court characterizes government property as falling into one of three categories. First, there is the "traditional public forum," which includes public streets and parks, and other "places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir.1997) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S.Ct.

3439, 3448, 87 L.Ed.2d 567 (1985)). In traditional public forums, content- based regulations of speech are subject to the "highest scrutiny," and are permissible only if they are "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

The second category of government property is the "designated" public forum — "a place not traditionally open to assembly and debate," *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3448, but "which the state has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45, 103 S.Ct. at 954. The designated public forum is subdivided into "limited" and "non-limited" classifications. In a designated public forum whose use is limited to particular purposes or speakers, restrictions on speech within those limits must be reasonable and viewpoint neutral. *General Media*, 131 F.3d at 282 n. 6 (citing, *inter alia*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995)). However, once government "allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir.1991). Thus, where the government has not limited the use of a designated public forum to a narrow subject matter, content-based regulations of speech are subject to the same scrutiny as that applied in a traditional public forum ("highest scrutiny"). *See International Soc'y*, 505 U.S. at 678, 112 S.Ct. at 2705. Because the distinction between a limited public forum and a non- limited public forum turns on the degree to which the government intended to make the property available for public use, a court must "examine the policy and practice of the government" to ascertain the property classification. *Lebron*, 69 F.3d at 656 (quoting *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3448) (internal quotes omitted).

The third property classification is the nonpublic forum, which encompasses all property not included in the other classifications. As stated earlier, restrictions on speech in a non-public forum need only be reasonable. *International Soc'y*, 505 U.S. at 679, 112 S.Ct. at 2705 (citing *Perry*, 460 U.S. at 46, 103 S.Ct. at 955).

Relying principally on *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) and *Lebron*, Defendants contend that the exterior of city buses are a nonpublic forum I disagree. In deciding that the interior of a city bus was not public forum, the Lehman Court relied on the fact that the city had "consciously ... limited access to its transit system advertising space," by prohibiting political advertising in city buses. *Id.* at 303, 94 S.Ct. at 2717. Similarly, in *Lebron*, the Second Circuit held that the large billboard in New York City's Pennsylvania Station was not a public forum because the defendant had "never opened the [billboard] for anything except purely commercial advertising." *Lebron*, 69 F.3d at 656. In the Lehman and Lebron cases, the government had sufficiently restricted the use of the property at issue to avoid classification as a designated, non-limited public forum.

The property at issue in this case is the exterior of MTA buses. Unlike in Lehman or Lebron, it is undisputed here that the MTA prohibits neither political nor commercial advertising on the property at issue. Rather, the MTA admits that it permits the genre of speech at issue here, and imposes no restriction on the class of speakers of which Plaintiff is a member. Tr. at 39, 41. By virtue of the MTA's general acceptance of commercial and political advertising, the exterior of an MTA bus is a public forum. *See Hevesi v. Metropolitan Transportation Authority*, 827 F.Supp. 1069, 1071 (S.D.N.Y.1993) (advertising spaces on New York City buses are designated public forums subject to full First Amendment protections because the MTA displayed a "wide variety of commercial and political messages" as advertising); *Penthouse v. Koch*, 599 F.Supp. at 1346-47 (Transit Authority created designated public forum for advertising of commercial and political speech by acceptance and display of such advertisements over significant period of time).

Thus the standard of review governing restrictions on speech on the exterior of an MTA bus is the same as the standard of review applicable to speech restrictions in traditional public forums. However, as discussed above, the strict scrutiny review is not applicable here because the Ad in issue involves commercial speech. Accordingly, the MTA's actions are subject to the Central Hudson

standard of review, rather than to the more permissive review accorded to speech in a limited or nonpublic forum.

E. The Exclusion of the Ad

The MTA concedes that the Ad was excluded because its Chairperson agreed with the Deputy Mayor that the Ad violated the terms of Section 50. Tr. at 46. The City also asserts that the Ad was excluded based on a potential conflict of interest. Tr. at 36 ("And I believe there is a public interest that the City of New York has in the use of the Mayor's name for commercial purposes, as the rules of the Conflicts of Interest Board make clear."). The latter argument is easily rejected. Chapter 68 of the City Charter addresses Conflicts of Interest. Sections 2604(b) of the Charter deals with prohibited conduct by a public servant. Specifically, Section 2604(b)(2) states that "[n]o public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties." Section 2604(b)(3) provides that:

> No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.

In a recent advisory opinion the City's Conflicts of Interest Board held that the use of a public servant's name or picture "presents a significant risk that the public servant's official position is being used to advance a private interest. Charter Section 2604(b)(3). Such use under such circumstances would also be in conflict with the proper discharge of the public servant's official duties. Charter Section 2604(b)(2)." Advisory Opinion No. 91-1, Exhibit B to City's Memorandum of Law. However, in that case the public servant had asked to appear in a print advertisement promoting a for-profit entity. The situation here is entirely different. First, the Mayor has not "used" or "attempted to use his position as a public servant to obtain any financial gain." Second, he has neither engaged in "any business, transaction or private employment" nor does he have "any financial or other private interest" that is in conflict with the discharge of his official duties.

It is abundantly clear from the text of the Ad that the Mayor is not endorsing the product. Furthermore, the purpose of the Ad not only promotes the interest of the for-profit entity, it also contains humor and satire, both of which enhance the quality of life for all New Yorkers.

I return then to the stated reason for the exclusion — Section 50 — which is recognized by the Advertising Standards of the MTA as a basis for excluding an advertisement. If this section applies to the Ad in issue, then the Mayor's right of privacy/publicity must be balanced against Plaintiff's First Amendment rights. If this section does not apply, then neither the MTA nor the City has a substantial interest in removing the Ad. In the absence of such a substantial interest, the Plaintiff's First Amendment right must prevail.

F. Does Section 50 Cover the Use of "Rudy" in the Ad in Issue?

Section 50 makes it a misdemeanor to "use[] for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person." Section 51 provides those injured by such conduct with a cause of action for injunctive relief and for damages. It is incontestable that the plain language of the statute appears to make it applicable to the Ad in issue. However, the terms of the statute must be "construed narrowly and not used to curtail the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed." *Rand v. Hearst Corp.*, 31 A.D.2d 406, 298 N.Y.S.2d 405, 410 (1st Dep't 1969), aff'd, 26 N.Y.2d 806, 309 N.Y.S.2d 348, 257 N.E.2d 895 (1970); *see also Groden v. Random House, Inc.*, 61 F.3d 1045, 1051 (2d Cir.1995). Consequently, it is "not sufficient to show merely, as plaintiff does here, that the acts complained of come within the four corners of the words used in the statutes." *Rand*, 298 N.Y.S.2d at 411.

1. The Purpose of the "Right of Publicity"

Rather than adhering slavishly to the letter of its text, courts construing Section 50 have looked to the underlying purpose of the

statute. *See Groden*, 61 F.3d at 1051 (citing *Rand*, 298 N.Y.S.2d at 410). The primary purpose of the statute is to protect privacy without preventing publication of matters of public interest. *Id.* (citing *Rand*, 298 N.Y.S.2d at 409). This is not, however, the only purpose. Most states now have laws similar to Section 50. Reviewing decisions construing those laws has proved instructive in discerning the purposes underlying these statutes. A recent decision by the Tenth Circuit Court of Appeals provides a detailed discussion of those purposes.

In *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 973-76 (10th Cir.1996), the court compiled numerous justifications for laws providing a right of publicity. Those justifications include: (1) providing an incentive for creativity and achievement; (2) maintaining some value to the commercial use of one's identity by prohibiting commercial exploitation; (3) preventing consumer deception; (4) allowing celebrities to enjoy the fruits of their labors; (5) preventing unjust enrichment; and (6) preventing emotional injuries.

None of these purposes cover the use of the Mayor's name in this Ad. First, as a highly visible public figure Giuliani's interest in his privacy is very limited. One who chooses to be the Mayor of the "Big Apple" must expect that he will be the subject of all kinds of public comments, even in advertisements. My review of scores of right to publicity cases from across the country does not reveal any such claims by a high-level public official — nor have the parties cited any. As the court stated in *Wilson v. Brown*, 189 Misc. 79, 73 N.Y.S.2d 587, 589 (Sup.Ct. Kings Co.1947) (rejecting Section 51 claim):

> [O]ne who takes an office, whether it is in government or in outside organizations, must be deemed to have agreed to any reasonable public use of, or reference to, his name .... Persons who accept high positions ought not to be so tender about the mention of their names; they must bear "the white light that beats upon a throne." If they want peace and privacy they should stay out of public life; if they object to having their names legitimately mentioned they need only resign and they will quickly subside into happy obscurity.

The Ad in issue comments on Giuliani's professional persona. As such, it does not invade his privacy. The six justifications in Cardtoons are equally inapplicable to the use of the Mayor's name in this Ad. The first, second and fourth, relating to the commercial value of a person's name, cannot apply to the Mayor, who is not permitted to exploit his public office in a commercial venture. The third justification, relating to consumer deception, is inapplicable because the public is correctly informed that the Mayor has not taken credit for N.Y. Magazine's success. The fifth justification does not apply because any benefit to N.Y. Magazine results from the witty political commentary in the Ad, rather than any association between Giuliani and the product. Finally, given the torrent of daily criticism that the Mayor endures, this Ad alone simply cannot cause him emotional distress!

2. The Judicial Exceptions to the Right of Publicity

The courts have engrafted exceptions and restrictions to Section 50 in order to "avoid any conflict with the free dissemination of thoughts, ideas, newsworthy events, and matters of public interest," guaranteed by the First Amendment. *Time, Inc. v. Hill*, 385 U.S. 374, 382, 87 S.Ct. 534, 539, 17 L.Ed.2d 456 (1967) (quoting *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 274 N.Y.S.2d 877, 879, 221 N.E.2d 543, 544-45 (1966)). The two principal exceptions are closely related: the "incidental use" and "public interest" exceptions.

a. Incidental Use Exception

In the particular context of advertisements for books and periodicals, New York courts have recognized an exception for the "incidental" use in ads or other promotional items of materials that "convey the nature and content," *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 131 (2d Cir.1984), or "prove [] the worth and illustrate [] the content" Groden, 61 F.3d at 1049 (citing cases), of the works being advertised. For example, the use of a photograph of a professional athlete in an advertisement for a sports magazine has been held not to be actionable under Section 50, as the photo was deemed to be merely incidental to the advertisement's larger purpose of selling magazines. *Namath v. Sports Illustrated*, 48 A.D.2d 487, 371 N.Y.S.2d 10, 11-12 (1st Dep't 1975), aff'd, 39 N.Y.2d 897, 386 N.Y.S.2d 397, 352 N.E.2d 584 (1976). While many New York cases applying the "incidental use" exception

involve the republication of items originally used in the underlying publication, republication is not required. *See Groden*, 61 F.3d at 1049. Furthermore, even where the advertisement does not conform precisely to the content of the underlying publication, the "incidental use" exception is applicable. *See, e.g., Velez v. VV Publ'g Corp.*, 135 A.D.2d 47, 524 N.Y.S.2d 186, 189 (1st Dep't 1988) (rejecting Section 50 claim where picture of plaintiff in magazine was used in subsequent advertisement which added cartoon bubble containing text to photo of plaintiff).

A recent New York case considered the scope of the incidental use exception in circumstances similar to those presented here. *See Stern v. Delphi Internet Serv. Corp.*, 165 Misc.2d 21, 626 N.Y.S.2d 694 (Sup.Ct.N.Y.Co.1995). That case addressed the use of talk show host Howard Stern's photograph in a magazine advertisement by an on-line service dedicated to the issue of Stern's candidacy for governor of New York. The court held that use of Stern's photograph constituted incidental use, because the Stern candidacy was "well within the range of subjects which courts have deemed to be of public interest, namely electoral politics," and because the advertisement "use[d] plaintiff's name and photograph to indicate the subject on the computer bulletin board." *Id.*, 626 N.Y.S.2d at 700.[5]

b. Public Interest/Newsworthy Exception

The public interest exception to Section 50 is closely related to the incidental use exception. Courts have applied the public interest exception to permit the use of photographs of persons without their consent where the photographs relate to a magazine, newspaper article or film concerning newsworthy events or subjects of public interest, including political events, social trends, scientific news, and stories of consumer interest. *See, e.g., Howell v. New York Post*

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[5] At least one court has indicated that the incidental use exception is inapplicable where an advertisement "conveys or reasonably suggests the subject's endorsement of the publication in question." *See Velez*, 524 N.Y.S.2d at 189. This limitation is inapplicable here because no reasonable reader could believe that Giuliani had endorsed N.Y. Magazine, given that the Ad pokes fun at him and the text of the Ad says that "Rudy" does not take credit for the product's success.

Co., 81 N.Y.2d 115, 596 N.Y.S.2d 350, 612 N.E.2d 699 (1993) (rejecting Section 51 claim where photo of a patient at a psychiatric hospital was printed in newspaper story concerning another patient at same hospital); *Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 318 N.Y.S.2d 474, 267 N.E.2d 256 (1971) (rejecting Section 51 claim where photo of plaintiff at St. Patrick's Day Parade was published on cover of magazine containing article on Irish immigrants).

In contending that the public interest exception is inapplicable in this case, Defendants rely on *Beverley v. Choices Women's Med. Ctr., Inc.*, 78 N.Y.2d 745, 579 N.Y.S.2d 637, 587 N.E.2d 275 (1991), in which a medical facility distributed a calendar promoting the facility, entitled "Women—Choosing to Make a Difference." The calendar depicted people and events in the history of the women's movement, including one photograph of the recipient of an award for achievement in women's medicine and the plaintiff, a doctor who was not affiliated with the medical facility but was identified by name. The court sustained the plaintiff's Section 51 claim, holding that the public interest exception did not apply, despite the fact that the calendar focused on the women's movement. "[A] commercial advertiser such as [the defendant] may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest, however commendable the educational and informational value." *Id.*, 579 N.Y.S.2d at 641, 587 N.E.2d at 278.

Beverley, however, is distinguishable from the case at bar. In evaluating the applicability of the public interest exception to the facts of the case, the *Beverley* court noted that the defendant is "not a media enterprise; its calendar was an advertisement of its only business — providing medical services." *Id.* at 640, 587 N.E.2d at 277. In contrast, the present case concerns advertisements for a publication of political commentary, the subject matter of which is deserving of the highest of constitutional protection. Moreover, N.Y. Magazine does not assert, as did the defendant in *Beverley*, that all uses of names or photographs in its advertisement are excluded from the reach of Section 50 because the advertisement serves some public interest. Rather, it is the very use of Giuliani's name here

that makes the statement newsworthy.[6] The defendant in *Beverley* could issue a calendar addressing the women's movement without mentioning the plaintiff. The Ad at issue, however, could not mock the Mayor's eagerness to take credit for all the City's successes without mentioning him.[7] Unlike in *Beverley*, therefore, the public interest element of the Ad in issue is inseparable from the use of the Plaintiff's name.

c. The Incidental Use and Public Interest Exceptions Applied

As an example of the relationship between the incidental and public interest exceptions, consider the following. The November 10, 1997 issue of N.Y. Magazine contained an article that discussed the possibility that Giuliani might one day campaign for President and speculated as to how he might perform as President. The article was illustrated with various caricatures of Giuliani dressed as George Washington. The dominant image on the magazine's cover is a caricature of Giuliani dressed as Washington, which was accompanied by large, bold text: "HOW FAR CAN RUDY GO?". Though the magazine cover is designed to attract customers and sell magazines, the caricature and use of Giuliani's name certainly did not violate Section 50. *See Murray*, 318 N.Y.S.2d at 476, 267 N.E.2d 256. By the same token, because its use of the Mayor's name falls within the public interest exception, if N.Y. Magazine were to reprint the caricature for an advertisement to be displayed on the sides of MTA buses, the caricature would clearly fall within the incidental use exception, given the subject matter of the article. Both exceptions therefore rely on the relationship between the use of Giuliani's name and the matters of public importance discussed in the magazine.

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[6] The advertisement was to be posted on MTA buses beginning just before Thanksgiving. Complaint at ¶ 11. Thus the advertisement was to circulate less than three weeks after the Mayoral campaign in which Giuliani's credit-seeking had been an issue.

[7] It should be noted that satire or a parody of a public figure is of no lesser public interest than other political discourse. *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Cardtoons*, 95 F.3d at 969.

The incidental use and public interest exceptions similarly exclude the Ad in issue from the reach of Section 50. New York City politics in general, and Giuliani in particular, are regular subjects of N.Y. Magazine articles, which are often written in a light-hearted and witty style. Even the very subject matter of the Ad's text — Giuliani's alleged penchant for claiming credit for New York's successes — has been a subject of N.Y. Magazine articles. Indeed, the November 10, 1997 article on Giuliani and the presidency mentions this subject: "The police, many of whom feel Rudy takes way too much credit for crime reduction, grumble about how the mayor gave himself a raise while they got none." Mark Jacobson, Rudy's Oval Office Dream, New York Magazine, Nov. 10, 1997, at 53 (emphasis added). The article's conclusion further refers to Giuliani as a man with "a sense of his own grandeur." *Id.* City politics always engenders newsworthy issues — and the Ad in issue informs the public that N.Y. Magazine addresses those issues.

Though the Ad as a whole is commercial speech, the advertisement undeniably includes an element of political commentary. It would be anomalous indeed to permit a reprint of a caricature of Giuliani that had appeared in the magazine, but prohibit the Ad at issue which includes speech of public interest.[8]

3. Summary

Given the notoriety and position of the person asserting the right of publicity and the content of the Ad in issue — which combines incidental use, public interest, and political satire — I conclude that Section 50 simply does not apply to this Ad.

G. Balance of Public Interests

The Court of Appeals has recently stated that:

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[8] The MTA argues that if Plaintiff had used the term "Mayor" rather than "Rudy," this would still violate Section 50. Tr. at 51 (citing *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (Sup.Ct.N.Y.Co.1984)). This creates another odd result, allowing N.Y. Magazine to create an advertisement satirizing the Board of Education or the Family Court, but not the Mayor or the District Attorney.

> [w]henever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief.

Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 929 (2d Cir.1997). Balancing such interests here is not difficult. In a certain sense, none of the parties has stated a compelling claim that its position affects a matter of great importance to the public. However, the underlying legal interests asserted by each of the parties are important. Plaintiff relies on the First Amendment and asks that such rights be carefully guarded. Defendants rely on their obligation to enforce their Advertising Standards, which incorporate Section 50. A public entity has a public interest in upholding the law. However, because Section 50 does not protect the use of the Mayor's name in the context of the Ad in issue, Defendants are unable to establish that they are acting in the public interest.

H. A Preliminary Injunction is Warranted

For the reasons set forth above, Plaintiff has shown both irreparable harm and a substantial likelihood of success on the merits of its claim for preliminary injunctive relief on its Section 1983 claim that Defendants have violated its First Amendment right to display the Ad in issue.

IV. Tortious Interference with Contract

A. Elements of the Claim

In order to prevail on a claim for tortious interference with contract under New York law, a plaintiff must prove: (a) the existence of a valid contract between plaintiff and another party; (b) defendant's knowledge of the existence of that contract; (c) defendant's intentional procuring or inducing, without legal justification or excuse, of a breach of that contract by the other party; and (d) resulting injury to plaintiff. *Int'l Minerals and Resources, Inc., v. Pappas*, 761 F.Supp. 1068, 1074-75 (S.D.N.Y.1991), aff'd in relevant part, 96 F.3d 586 (2d Cir.1996); *Sharma v. Skaarup Ship Management Corp.*, 699 F.Supp. 440, 446 (S.D.N.Y.1990); *Artwear, Inc. v. Hughes*, 202 A.D.2d 76, 615

N.Y.S.2d 689, 694 (1st Dep't 1994) (citing *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 151 N.Y.S.2d 1, 5, 134 N.E.2d 97, 99-100 (1956)); *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 108 A.D.2d 351, 489 N.Y.S.2d 478, 480 (1st Dep't 1985). Plaintiff must demonstrate that the interference with its contractual relations was "intentional, not merely negligent or incidental to some other, lawful, purpose ..." *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 413 N.Y.S.2d 309, 312, 385 N.E.2d 1238, 1241 (1978) (citations omitted); *Costanza Constr. Corp. v. City of Rochester, Inc.*, 135 A.D.2d 1111, 523 N.Y.S.2d 707, 708 (4th Dep't 1987).

B. Likelihood of Success on the Merits

Plaintiff has not shown a likelihood of success on the merits of this claim. First, as a technical matter, the contract at issue is between N.Y. Magazine and TDI, not between Plaintiff and the MTA. While TDI is retained as the MTA's advertising contractor, the Complaint is defective in pleading that N.Y. Magazine had a contract with the MTA. Of greater importance, is the notion of intentional interference. There is no doubt that the Ad was pulled because the Mayor advised his Deputy to alert the MTA to his view that the Ad violated his rights under Section 50. In that sense, it was the City's action, through the Mayor's representative, that caused TDI to default on its contract with N.Y. Magazine. However, the MTA (and the City) is required to enforce the Advertising Standards adopted by its Board. Once the City alerted the MTA to the Section 50 claim, the MTA was obliged to pull the Ad if it agreed that the Ad violated Section 50.

The City is not responsible for the MTA's decision to pull the Ad. Both the City and the MTA had the right to be wrong without being liable for intentionally interfering with a contract. Whether Section 50 covers this Ad, as discussed at length above, is a close question. It was perfectly reasonable for the City and the MTA to believe that it did. Indeed, no less an authority than the editorial page of the New York Times opined that, "The Mayor may have been technically within his rights, thanks to a state law protecting people from having their names or faces used in advertisements without their permission." New York Times, November 25, 1997

at 24. It appears that the City acted with justification and incident to a lawful purpose, namely upholding Section 50.

To determine whether interference with a contract may be justified, the New York Court of Appeals has adopted the formulation of the Restatement (Second) of Torts § 766 (1979). *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 189, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980). That section states, in pertinent part that:

> One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contact.

Id. (emphasis added). Section 767 of the Restatement then lists several factors to be considered in determining whether an intentional interference is improper.

> The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation.

Id. at 190, 428 N.Y.S.2d 628, 406 N.E.2d 445. In *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 F.2d 286, 292 (2d Cir.1992), the court acknowledged the test adopted by the Court of Appeals and set forth the factors that must be balanced.

> These factors include: the nature of the defendant's conduct, the defendant's motive, the interests of the plaintiff with which the defendant interferes, the interests the defendant seeks to advance, the social interests at stake, the proximity of the defendant's conduct to the interference, and the relations between the parties.

Considering all of these factors, Plaintiff has not shown a likelihood of success on its claim that the City intentionally ("improperly") interfered with Plaintiff's contract with TDI.

V. Conclusion

Plaintiff has shown that it is entitled to preliminary injunctive relief on its § 1983 claim that Defendants have violated its First Amendment rights. Accordingly, Defendants are enjoined and restrained from refusing to display, or restricting or limiting the display of PRIMEDIA's advertisements on city buses pursuant to its September, 1997 contract with TDI. The Ad in issue should be reinstated forthwith.

SO ORDERED:

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE

40 FOLEY SQUARE

NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of March one thousand nine hundred and ninety-eight.

New York Magazine

Appellee

v

The Metropolitan Transit Authority

Appellant

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant The Metropolitan Transit Authority and the City of New York.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, CLERK

By: _____

Beth J. Meador,

Administrative Attorney

FILED
JUL 15 1998

No. 97-2020

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

vs.

NEW YORK MAGAZINE,
A DIVISION OF PRIMEDIA MAGAZINES INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Metropolitan Transportation Authority ("MTA") was properly preliminarily enjoined from refusing to display an advertisement on the outside of New York City buses as per contractual agreement, when the MTA (i) had opened that advertising space for all categories of speech, both political and commercial; (ii) acted without any procedural safeguards, in contravention of its own regulations, and solely because of the complaint of the Mayor of New York City; and (iii) acted solely on the grounds that that advertisement *may* violate the Mayor's personal rights under a state statute?

PARTIES TO THE PROCEEDINGS

The Petition accurately lists the parties to the proceeding.

PRIMEDIA Magazines Inc. is a wholly-owned subsidiary of K-III Prime Corporation, which is a wholly-owned subsidiary of PRIMEDIA Inc., which is a publicly owned and held corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Statutory and Regulatory Provisions Involved	1
Statement	1
A. Statement of the Case	2
B. Statement of Facts	3
C. The Decisions Below	6
Reasons For Denying the Writ	7
I. The Procedural Posture Of This Case Militates Against Review By This Court.	8
II. The Public Forum Analysis Of The Court Of Appeals Is Fully Consistent With This Court's Precedents.	9
III. The First Amendment Analysis Of The Court Of Appeals Is Fully Consistent With This Court's Precedents.	17
Conclusion	25

TABLE OF CITATIONS

Cased Cited: *Page*

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 23

American Constr. Co. v. Jacksonville, T & K. W. R. Co., 148 U.S. 372 (1893) 8

Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) 12

Beauharnais v. Illinois, 343 U.S. 250 (1952) 22

Blount v. Rizzi, 400 U.S. 410 (1971) 24

Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989) 22

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) 22

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 22

Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth., No. 96-1829, 1998 U.S. App. LEXIS 13564 (3d Cir. Jun. 25, 1998) 15

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 22, 24

City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1987) 19, 21

Page

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 9, 10, 12

Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n, 518 U.S. 727 (1996) 12

Edenfield v. Fane, 507 U.S. 761 (1993) 13

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) 19, 20

Freedman v. Maryland, 380 U.S. 51 (1965) 19, 20

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) .. 20

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) 8

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 22

Ibanez v. Florida Dep't of Bus. and Prof'l Regulation Bd., 512 U.S. 136 (1994) 13

International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) 10, 11, 15

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 11

Morse v. Republican Party, 517 U.S. 186 (1996) 24

Page

National Endowment for the Arts v. Finley, No. 97-371, 1998 U.S. LEXIS 4211 (June 25, 1998) 21

National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) 20

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) .. 22

Niemotko v. Maryland, 340 U.S. 268 (1951) 20

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 9, 16

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 15

Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) 22

Rogers v. New York Transit Auth., 89 N.Y. 2d 692, 657 N.Y.S. 2d 871, 680 N.E. 2d 142 (N.Y. 1997) ... 11

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995) 15, 16

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 13, 22

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) ... 20

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105 (1991) 15

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 11, 20, 21

Page

Spahn v. Julian Messner, Inc., 18 N.Y. 2d 324, 274 N.Y.S. 2d 877, 221 N.E. 2d 543 (1966), *vacated and remanded*, 387 U.S. 239 (1967), *aff'd in relevant part on remand*, 21 N.Y. 2d 124, 286 N.Y.S. 2d 832, 233 N.E. 2d 840 (1967), *appeal dismissed*, 393 U.S. 1046 (1969) ... 19

Time, Inc. v. Hill, 385 U.S. 374 (1967) 19

United States v. Kokinda, 497 U.S. 720 (1990) 11

University of Texas v. Camenisch, 451 U.S. 390 (1981) 9

Virginia State Bd. of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) 22

Ward v. Rock Against Racism, 491 U.S. 781 (1989) ... 20

Waters v. Churchill, 511 U.S. 661 (1994) 20

Widmar v. Vincent, 454 U.S. 263 (1981) 11

United States Constitution Cited:

First Amendment ..... *passim*

Statute Cited:

42 U.S.C. § 1983 (1988) 1, 2, 6

Page

Other Authority Cited:

N.Y. Civil Rights Law § 50 (McKinney 1998) ..... *passim*

APPENDIX

Appendix A — Board Resolution 1a

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This is an action brought pursuant to 42 U.S.C. § 1983 (1998) which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The MTA enacted certain regulations with respect to advertisements on the outside of city buses, a copy of which is Appendix A hereto.

Also pertinent to this action is N.Y. Civ. Rights Law § 50 (McKinney 1998), reproduced as part of Appendix A hereto.

STATEMENT

Respondent *New York* Magazine, a division of PRIMEDIA Magazines Inc. ("*New York* Magazine") respectfully opposes this Petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Second Circuit issued on January 22, 1998, affirming the grant of a preliminary injunction restraining Petitioner The Metropolitan Transportation Authority ("MTA") from refusing to display an advertisement on the outside of New York City buses. That advertisement juxtaposed the words "Possibly the Only Good

Thing About New York Rudy Hasn't Taken Credit For", next to the name and logo of *New York* Magazine (the "Advertisement").

A. Statement of the Case

This is an action brought by *New York* Magazine against the MTA as a result of the MTA's summary, extra-regulatory, extra-contractual and unconstitutional refusal to display the Advertisement on the outside of city buses; notwithstanding the uncontroverted facts that the MTA was acting under color of state law, had contracted with *New York* Magazine to post the Advertisement, and the Advertisement had been approved over a month in advance of scheduled display pursuant to the applicable agency regulations; solely because of a telephone call from the office of the Mayor complaining about the Advertisement; without advance notice to *New York* Magazine or affording it any opportunity to object to this deprivation of its First Amendment rights.

To read the MTA's petition, one would believe that this action was a facial challenge to the constitutionality of the applicable MTA regulatory scheme. It is not. Both the District Court and the Court of Appeals held that *New York* Magazine had satisfied its burden of proof sufficiently to warrant the grant of a preliminary injunction on its claim pursuant to 42 U.S.C. § 1983.

To read the MTA's petition, one would also believe that the MTA had developed a full record below as to the governmental purposes underlying its regulatory scheme, that that scheme had been followed, and that the limitations it was seeking to impose upon speech were justified — not just by the whim of a mercurial mayor — but by a legitimate and substantial governmental interest. To the contrary, the record is devoid of

any governmental interest underlying the MTA's action, not to speak of a substantial one, and whether the regulations in issue are or are not either reasonable or narrowly tailored, they simply were not followed.

It is not hard to fathom why both courts below issued the relief requested: whether the Advertisement is viewed as pure commercial or core speech and whether or not the outside of city buses are a designated public forum, the MTA failed to carry its heavy burden of justifying the imposition of a prior restraint against *New York* Magazine's exercise of its First Amendment right to poke fun of or to criticize the Mayor of the City it covers.

Because of: (1) the preliminary nature of this proceeding; (2) the paucity of the record created by the MTA; (3) the preliminary injunction standard; and (4) the fact that the decision of the court below is fully consonant with the applicable Supreme Court precedents; review of this decision at this juncture is wholly unwarranted.

B. Statement of Facts

New York Magazine is a weekly publication, published continuously since 1968, which covers events, happenings, people and politics in and around the greater New York City metropolitan area. J.A. 26.[1] The magazine regularly and prominently includes political commentary and, almost weekly, includes some mention or discussion of the Mayor of the City of New York, Rudolph Giuliani, who is widely known as "Rudy". Pet. App. 23a. Over the years, it has published dozens

---

1. Citations to the Joint Appendix below are in the form of J.A. __; citations to the Petition are in the form of Pet. __; citations to the Appendix to the Petition are in the form of Pet. App. __; and citations to the Appendix hereto are in the form Opp. App. __.

of articles about the Mayor; these articles have been both critical and complimentary. J.A. 26. Immediately prior to the events in issue and following his November 1997 victory in the most recent mayoral election, Giuliani was caricatured on a November 10 *New York* Magazine cover story. *Id.*, 126-134. His penchant to claim credit for everything positive which has occurred in the City was a prominent issue in that election campaign and was part of that cover story. *Id.*

The Advertisement was the subject of a short-form contract, entered between *New York* Magazine and Transportation Displays, Incorporated ("TDI"), the contracting agent for the MTA, effective September 29, 1997 (the "Agreement"). J.A. 30-31. Under the Agreement, *New York* Magazine was to provide physical copies of the Advertisement by November 15, "so that postings will go up before Thanksgiving. . . ." *Id.* The Agreement is conditioned upon, *inter alia*: "approval of TDI and the [MTA] . . . as to character, text, illustration, design and operation" of advertising copy (*id.*, ¶ III.a); and *New York* Magazine's agreement to indemnify and hold harmless TDI and the MTA against any resultant liability (*id.*, ¶ VI.a). There are MTA regulations regarding advertising on city buses (the "Standards"). Those Standards provide, *inter alia*, that the MTA may decline to post an advertisement that *may* violate § 50 of the New York Civil Rights Law ("§ 50"), which proscribes, *inter alia*, the use of a person's name for trade or advertising purposes and prohibits non-consensual commercial endorsements. Opp. App. 15a.

After the Agreement was accepted in late September and in the midst of the mayoralty campaign, the Advertisement was conceived and selected as the centerpiece of *New York* Magazine's new advertising campaign. J.A. 27. Sometime during the week of October 17, it was submitted to TDI for approval under the terms of the Agreement and was approved that same

week. *Id.*, 25, 117. Five weeks later, the Advertisement was printed and timely delivered. J.A. 25, 117. The weekend it was scheduled to be posted on city buses, Mayor Giuliani guest-hosted the nationally-televised NBC television network satiric comedy "*Saturday Night Live*" dressed in drag. J.A. 34. Amidst accounts of that performance, the press first reported that the Deputy Mayor had demanded that the MTA kill the Advertisement and that the MTA Chairman had complied (*id.*, 32-33, 25), presumably on the grounds that it violated the Mayor's rights under § 50 (*id.*, 76-77). Far from an express or implied non-consensual commercial endorsement, the Advertisement expressly states that the Mayor does *not* take credit for the product, *i.e.*, *New York* Magazine. *Id.*, 135; Pet. App. 39a.

The MTA did not notify *New York* Magazine of its change of position, nor did it afford the Magazine an opportunity to object or respond. When *New York* Magazine learned from the press reports of the MTA's action, it called the MTA and was orally advised that the Advertisement had been pulled at the "request" of the "Mayor's Office". J.A. 26. Pursuant to the very Standards on which the MTA relied to kill the Advertisement, it was obligated to provide prompt written notice of a decision not to approve an advertisement and the reasons therefor, and to afford the advertiser an opportunity to object to that determination and explain the reasons for its objection. *Id.*, 140, ¶ (c)(i). Obviously, since this Advertisement was approved without objection over five weeks prior to the MTA's summary action, the MTA's action was taken neither pursuant to regulation, nor in conformity with it.

In the face of this advice, *New York* Magazine filed suit on affidavits setting forth what had transpired, seeking a preliminary injunction against the MTA and the City of New York under, *inter*

alia, 42 U.S.C. § 1983.[2] *Id.*, 4-28. At the hearing on that application, neither the City nor the MTA submitted any factual record, whether by affidavit or testimony, apart from two advisory opinions with regard to Chapter 68 of the City Charter (*id.*, 171-172, 175-176), and a stipulation regarding the on-sale date of the November 10, 1997 issue of the Magazine (*id.*, 118, 125). *New York* Magazine's uncontroverted supporting affidavits were admitted (*id.*, 118), together with certain stipulations, including the fact that the MTA accepts both political and commercial advertisements for display on City buses (*id.*, 81-82), as well as certain exhibits, including the Standards (*id.*, 119).[3]

C. The Decisions Below

The District Court granted the preliminary injunction, finding that the outside of New York City buses were a designated public forum (Pet. App. 37a); the Advertisement was commercial speech (*id.*, 33a); therefore, the critical question was whether the MTA had a substantial interest justifying refusal to post the Advertisement (*id.*, 35a); and because the Advertisement did not violate § 50 under the judicially-crafted newsworthiness and incidental use exceptions to that statute, the MTA had no such substantial interest (*id.*, 45a).

On appeal, the Second Circuit did not reach either the issue of whether the Advertisement violated the Mayor's commercial privacy rights, or the issue of whether the Advertisement should be treated as commercial speech. It held that it was not required

2. The City was later dismissed as a party by the Court of Appeals. Pet. App. 5a-6a.

3. There was some dispute as to the applicability and admissibility of new MTA regulations, effective September 30, 1997, after the effective date of the Agreement. Those new regulations expressly state they apply only to "future contracts". J.A. 148. As noted by the Court of Appeals, this issue is irrelevant to these proceedings. Pet. App. 4a n.1.

to reach these issues because the MTA, having opened the advertising space on the outside of city buses for all categories of speech, whether commercial or political, could not summarily and without any procedural safeguards exclude speech within those permitted categories, simply because that speech *may* violate an individual's commercial privacy rights. *Id.*, 14a-15a. The kind of limitations included in the Standards cannot be bootstrapped to define the nature of the forum; they must be justified as exclusions narrowly tailored to serve a compelling governmental interest. *Id.*, 10a-11a. Finding neither a compelling governmental interest nor narrow tailoring to advance same, the Court affirmed. *Id.*, 13a-14a. Alternatively, the Court found that the Advertisement could not withstand the intermediate scrutiny applied to pure commercial speech. *Id.*, 14a. A Petition for Rehearing and for Rehearing *En Banc* was thereafter denied. *Id.*, 50a.

REASONS FOR DENYING THE WRIT

The parade of horribles posited by the MTA in support of this petition is neither supported by the evidentiary record, nor particularly relevant to the facts of this case, nor accurate. Far from imposing "a wholly unmanageable regime" (Pet. 6); "throw[ing] an important area of First Amendment law into confusion" (*id.*, 7); or "requiring wholesale revision of the policies of countless public agencies" (*id.*); the decision of the court below did no more in *this case* than to require the MTA to post a humorous advertisement, which has long since had its "run", and does no more as a future precedent than compel the MTA to articulate standards for refusing advertisements in a manner consistent with the longstanding holdings of this Court.

I.

THE PROCEDURAL POSTURE OF THIS CASE MILITATES AGAINST REVIEW BY THIS COURT.

This Court's well-established practice is to exercise its certiorari jurisdiction "sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). None of those circumstances are presented by this case, which involves a straightforward application of this Court's existing precedents to a unique set of facts. Although petitioner attempts valiantly to cast the issues presented here as ones with dramatic consequences for "government at all levels" (Pet. 1), the affirmation of this preliminary injunction only has meaningful application in this specific case: the MTA decides whether to exclude advertisements on a "case-by-case basis" (*id.*, 8), and respondent has not brought a facial challenge to the MTA's Standards.

In addition, this case involves an interlocutory order, which this Court normally does not review unless "[n]ecessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause". *American Constr. Co. v. Jacksonville, T & K. W. R. Co.*, 148 U.S. 372, 384 (1893). The disfavored status of review at this stage is, in part, a product of the largely undeveloped state of the record. As this Court has stated:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary . . . a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Here, the record is virtually devoid of any factual underpinning for petitioner's claims of governmental purpose or for its predictions of dire consequences. Also militating against review at a preliminary stage is the possibility of duplicate applications to this Court after a full record has been developed at trial.

In short, nothing about the legal principles involved in this case justifies granting of the writ and strong policy measures caution against it.

II.

THE PUBLIC FORUM ANALYSIS OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

The MTA and *New York* Magazine agree that the MTA, as a government actor, cannot unconstitutionally deprive the Magazine of its First Amendment rights on public property. They disagree however as to whether it has done so here. That disagreement stems from a disagreement as to the proper standard of review of the MTA's decision to kill the Advertisement. The Court of Appeals properly considered and applied this Court's public forum precedents to find that the MTA's action was unconstitutional. None of the strained interpretations of existing law offered by petitioner justifies further review of that determination.

1. This Court has emphasized that the first question in classifying a forum under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and, indeed, the determinative question, is the intent of the government in operating that forum, *i.e.*, the intent to open non-traditional spaces for the benefit of the public discourse. *Cornelius v.*

NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985). This inquiry requires an analysis of both the nature of the government property and the nature of the restraints on the forum. *Id.* Examining the "intent" of the MTA on the basis of the limited record here is, of necessity, somewhat constrained. The MTA, which bears the burden of proof, relies solely on self-serving argument. In fact, the record on point consists solely of the stipulation that the MTA permits all commercial and political speech on the outside of city buses, and the objectives of the MTA set forth in the Standards (or, rather, in the Board Resolution which accompanies them). These two sources support the conclusion, particularly for preliminary injunction purposes, that the MTA intended to open a public forum.

A key question in determining *both* the nature of the government property and the nature of the government restraints is whether the government is acting in a regulatory or proprietary capacity in operating the forum. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) ("*ISKCON*"). As the Second Circuit noted here, the fact that the MTA allows political speech serves to underscore the conclusion that the MTA operates the outside of the city buses in a regulatory, rather than a proprietary capacity, and thus intended to open the space to the public at large:

> Disallowing political speech, and allowing commercial speech only, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of clashes of opinion and controversy that the Court in *Lehman* recognized as inconsistent with sound commercial practice.

Pet. App. 11a.

The conceded fact that the MTA does not restrict that advertising space by excluding any "categories" of speech sharply distinguishes this case from both *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) and *ISKCON*, the two authorities on which petitioner places primary reliance. In each of those cases, and indeed, in all of the Supreme Court cases assessing like public fora, distinct "categories" of speech or expressive conduct were excluded, leading to the logical conclusion that the government did not intend to commit the space to all manner of expressive activity. *See Lehman*, 418 U.S. at 303-4 (political speech excluded from forum);[4] *ISKCON*, 505 U.S. at 685 (solicitation and distribution excluded from forum); *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (solicitation excluded from forum).[5] *Contrast Widmar v. Vincent*, 454 U.S. 263 (1981) (public forum found where school facilities open generally to all students for all categories of speech); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (public forum found where municipal theater "designed for and dedicated to" expressive activities).

Likewise, the Standards militate in favor of finding a designated public forum based upon the MTA's role as "regulator". Certainly the Board resolution authorizing those Standards includes reference to the orderly operation of the transit system to generate revenue, but just as certainly and far more pervasively, it recites the "compelling interests" of

4. Further distinguishing *Lehman*, that case involved advertising on the *interior* of city buses and therefore the "risk of imposing on a captive audience" was of serious concern. *Lehman*, 418 U.S. at 304. The ad space here is not such a "captive forum".

5. The same is true of *Rogers v. New York Transit Auth.*, 89 N.Y. 2d 692, 657 N.Y.S. 2d 871, 680 N.E. 2d 142 (N.Y. 1997), which the MTA deems irreconcilable with the Court of Appeals decision here. Pet. 18-19. There, the New York City Transit Authority precluded an entire category of expressive conduct, not a subset thereof.

protecting minors from "harmful" speech, avoiding connection with advertiser's viewpoints, and furthering the interests of patrons in avoiding advertisements which contain "offensive sexual material". Opp. App. 1a-2a, 13a. Thus, the stated purposes of the Standards and the alleged purpose of the standard under which the Advertisement was excluded, are the enforcement of state law. It is hard to fathom more direct evidence of the MTA'S regulatory intent in operating this forum.

To avoid designated public forum status notwithstanding the inclusion of all categories of speech, the MTA tries to fit within the rubric of *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633 (1998). There, this Court held that where access to the government property is very tightly regulated on a speaker-by-speaker basis within an "eligible" class of speakers, and there is no other "evidence of a purposeful designation for public use", no public forum exists. 118 S. Ct. at 1636-37 (quoting *Cornelius*, 473 U.S. at 805).[6] The MTA tries to create a selective class of "speakers" eligible to display ads on the outside of city buses, *i.e.*, "paying customers" who agree to abide by the Standards. Pet. 9. If a payment requirement alone suffices to define the nature of the forum, then any governmental fora which are accessible only by payment of a fee are, *ipso facto*, nonpublic. More to the point here, *New York* Magazine was within that self-serving "class" of speakers: it

6. Transposing *Forbes* onto the facts of this case would be ill-conceived because *Forbes* was not a typical public forum case; to the contrary, this Court extrapolated its public forum law into an area *never* traditionally considered to be a public forum because of the journalistic and editorial discretion necessarily granted broadcasters and the attendant countervailing First Amendment concerns. *Forbes*, 118 S. Ct. at 1639. As a result, the presumption in *Forbes* had to be *against* the finding of open access. As this Court recently noted in *Denver Area Educ. Telecomm. Consortium, Inc. v. Federal Communications Comm'n*, 518 U.S. 727, 747 (1996) (plurality opinion), engrafting traditional public forum analysis into new areas can create anomalous results.

paid for the advertising at stake, submitted it for approval and agreed to indemnify the MTA. Those are the only limitations imposed on the speaker, rather than the speech.

2. By virtue of the questions that the MTA asks this Court to review, it appears to concede that if the outside of city buses are a designated public forum as the above facts demonstrate, then the Standard upon which it supposedly acted here cannot survive either strict or intermediate scrutiny, as the courts below held. That concession is hardly surprising as none of the supposedly "compelling" interests articulated in the Standards so much as reference § 50, not to speak of providing a compelling interest in suppressing advertisements which "may" violate it.[7] To the extent the MTA argues that by its Standards it seeks to uphold the law in general, it offers no reason why it has singled out § 50 for particular enforcement beyond avoiding the expense of litigation under that statute. Pet. 16 n.9. And as the Court of Appeals noted, that collateral purpose is amply served by the indemnity provision in the Agreement. Pet. App. 12a.

3. To avoid the conclusion that the MTA's own actions opened the outside of city buses as a designated public forum and the consequent unconstitutionality of its action with respect to the Advertisement, petitioner argues that its Standards created a "limited" public forum (Pet. 16-18), *i.e.*, a forum open generally to the public for certain restricted categories of speech or limited to certain classes of speakers. There is nothing "limited" about a forum that allows all categories of speech.

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7. Even under intermediate scrutiny, the government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995); *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation Bd.*, 512 U.S. 136, 143 (1994).

The MTA nonetheless posits a "limitation" by arguing that the Standards define what it terms the "contours" of its forum. *Id.*, 8, 17. The MTA cannot use its regulations to define the limits — and therefore the nature — of its forum, because those limitations are limitations *within* a category of speech. Even the MTA concedes that one cannot discriminate within a category of speech to which a public forum has been opened, without satisfying strict scrutiny. *Id.*, 8.

The Court of Appeals was clearly correct in warning that the MTA's proffered analysis would work an impermissible end-run around the protections crafted by this Court and mandated by the First Amendment:

> [I]t cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes *ipso facto* a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.

Pet. App. 10a (citations omitted). The MTA's construction blurs the difference between category exclusions and regulation within a category to the point of indistinction and suggests that any example of speech that the MTA excludes, no matter how constricted or narrowly defined, would be subject only to a review for reasonableness. By petitioner's reasoning, this forum should be defined as open to "all speech that does not, in the discretion of the MTA, potentially violate § 50". The MTA could, under this theory, exclude any advertisement in the "category" of "magazine promotions parodying the Mayor".

Yet petitioner acknowledges, citing *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995), that the government " 'must respect the lawful boundaries it has itself set' ". Pet. 17.

That content-based exclusions within an otherwise open forum cannot be used to bootstrap a determination that the forum is closed, is precisely the teaching of *Rosenberger*. There, applicants who published a religious newspaper were excluded from access to a university funding program that did not exclude the general subject matter of religion. The Court held unconstitutional the exclusion of "an entire class of viewpoints" as a means of circumventing strict scrutiny within a category of speech otherwise permitted in the forum. 515 U.S. at 831; *see also ISKCON*, 505 U.S. at 685 ("[I]f ISKCON is given access, so too must other groups"). In other contexts, this Court has recognized that like distinctions within a category of speech cannot pass constitutional muster. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (requiring criminals to disgorge profits derived from speech about crime, but not from speech about other topics); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (excluding fighting words on certain disfavored topics, but not others).[8]

Allowing a transit facility such as the MTA to destroy the otherwise "open" status of a forum by regulating within a category of speech would avoid the constitutional imperative

8. *See also Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Auth.*, No. 96-1829, 1998 U.S. App. LEXIS 13564 (3d Cir. Jun. 25, 1998). Petitioner argued below that the facts of that case were "virtually indistinguishable" from the facts presented here, and relies in this Court on the District Court decision in that case. Pet. 19. Since that argument was advanced, the Third Circuit reversed the District Court, finding that advertising space in subway and commuter rail stations constituted a public forum in which an advertisement within a permitted category of speech could not be excluded without surviving strict scrutiny.

that it justify such exclusion under strict or intermediate scrutiny. Such a bootstrap is a license to engage in viewpoint discrimination. That cannot be a constitutional result.[9]

4. Even assuming *arguendo* that the outside of New York City buses are a nonpublic forum under *Perry*, restrictions imposed must nonetheless be "reasonable in light of the purpose which the forum at issue serves" (460 U.S. at 49) and "not an effort to suppress expression merely because public officials oppose the speaker's view" (*id.*, at 46). As this Court recently emphasized: "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant". *Rosenberger*, 515 U.S. at 829. The restrictions here were neither reasonable nor viewpoint neutral. As discussed above, the record is devoid of *any* purpose for the § 50 regulation, and of any basis for the MTA to single out this particular statute in its Standards. Even assuming a reasonable governmental purpose, the facts of this case, albeit only partially developed due to its procedural status, strongly suggest impermissible viewpoint discrimination. The Advertisement was reviewed weeks in advance and had been approved for publication five weeks before it was summarily pulled at the direct request of the Mayor's office. That Mayor Guiliani did not like the ad was the subject of nightly television coverage for over a week. That the ad is critical or, at least, not

9. Even if the Standards "limit" the forum, the MTA's refusal to display the Advertisement was unconstitutional, because the Advertisement fell precisely within the narrow "contours" of that "limited" forum. By the MTA's own definition, *New York* Magazine paid for space, submitted the Advertisement for screening, and the only court to rule on point found that the Advertisement did *not* violate § 50. Pet. App. 44a-45a. The Second Circuit simply found it unnecessary to reach the § 50 issue. Despite the MTA's unsupported assertion to the contrary (Pet. 4 n.3), there is absolutely no requirement that this Court assume that the Advertisement violated § 50, particularly where the MTA bore the burden of justifying the exclusion under that statute.

complimentary, is self-evident. The MTA does not, and indeed cannot, deny that but for the demands of the Deputy Mayor, the Advertisement would have appeared without hitch. This is strong evidentiary support for the inference of viewpoint discrimination, particularly at the preliminary injunction stage.

III.

THE FIRST AMENDMENT ANALYSIS OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS.

Likelihood of success on the merits and irreparable injury are the touchstones of a preliminary injunction. In the circumstances here, where neither the MTA nor the Mayor — who is not even a party to the action — could conceivably suffer irreparable injury as a result of the display of the Advertisement, and where *New York* Magazine's First Amendment rights — whether core or commercial — were undeniably impinged, that a preliminary injunction was appropriate cannot be seriously questioned.

In apparent recognition that the facts of *this* case leave no real room for argument — not to speak of presenting an issue worthy of this Court's consideration — the MTA resorts to an interpretation of the Court of Appeals' decision which extends far beyond its actual holding. Thus, petitioner argues that that decision

> means that the MTA lacks the discretion to refuse advertisements in violation of its Standards, even assuming those Standards are substantively valid, without undertaking cumbersome judicial proceedings in which the MTA bears the burden of proof and the standard is strict scrutiny.

Pet. 20. The multiple assumptions underlying this rather extraordinary statement are, at best, suspect.

1. The mere fact that the MTA's refusal to display this Advertisement at the request of the Mayor and in violation of the MTA's own procedures was a prior restraint, does not mean that the MTA cannot refuse *any* advertisement without judicial sanction. The precise holding of the court below is, appropriately, addressed to the specific facts of this case:

> This case aptly demonstrates that where there are both commercial and political elements present in speech, even the determination whether speech is commercial or not may be fraught with ambiguity and should not be vested in an agency such as MTA. . . . While we accord somewhat lowered scrutiny to government restrictions on the right to propose commercial transactions, protecting the right to express skeptical attitudes toward the government ranks among the First Amendment's most important functions.

Pet. App. 13a-14a (citations omitted).

2. The MTA's entire argument is premised upon the fact that its Standards are "substantively valid". Pet. 20. This is not a facial challenge to the entirety of those Standards: that issue was neither raised below, nor decided by the Court below. *This* case addresses only the standard vesting the MTA with unbridled discretion to refuse an ad on the grounds that it *may* violate § 50, and then, only as applied to a refusal to display this particular Advertisement.

Even if it were in issue, the MTA's assumption of the wholesale validity of its Standards is dubious. Many of the

Standards appear to exclude examples of speech that fall within the broad categories of speech permitted in the forum, and do so in a manner which could not survive First Amendment scrutiny. The absence of procedural safeguards in the Standards compounds the problem: regulations which leave to the unbridled discretion of administrators whether or not a particular advertisement "may" violate the someone's commercial privacy rights under § 50[10] or "may" constitute a penal offense concerning obscenity, are not prime examples of the "precise tailoring" that First Amendment jurisprudence mandates. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58, (1987) ("It is not difficult to visualize a newspaper . . . feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application"); *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965) ("[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

3. Nothing in the Court of Appeals decision requires the MTA to undertake "cumbersome judicial proceedings" in every

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10. This concern for abuse is heightened in the context of § 50 as explained in *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967) (citing *Spahn v. Julian Messner, Inc.*, 18 N.Y. 2d 324, 328, 274 N.Y.S. 2d 877, 879, 221 N.E. 2d 543, 544 (1966), *vacated and remanded*, 387 U.S. 239 (1967) (remanded in light of *Time, Inc. v. Hill*), *aff'd in relevant part on remand*, 21 N.Y. 2d 124, 286 N.Y.S. 2d 832, 233 N.E. 2d 840 (1967), *appeal dismissed*, 393 U.S. 1046 (1969)). And unlike the commercial speech cases petitioner cites upholding administrative orders enjoining false or misleading advertising (Pet. 22), where it might be argued that it is appropriate to defer to the particular agency expertise, no one here has so much as suggested that the MTA has any particular expertise in determining whether an advertisement violates an individual's commercial privacy rights.

instance. This Court has long indicated that administrative review, *with appropriate judicial safeguards*, suffices to protect the attendant First Amendment rights. *Waters v. Churchill*, 511 U.S. 661, 686 (1994) (Scalia, J., concurring); *Freedman v. Maryland*, 380 U.S. at 58-59; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 155 n.4 (1969).[11] Not every administrative proceeding challenging an adverse determination under the Standards will necessitate further judicial action. Likewise, there is nothing either unprecedented or inappropriate about the MTA bearing the burden of proof before exercising its power as a regulator to suppress speech. *See FW/PBS v. Dallas*, 493 U.S. at 225; *Freedman v. Maryland*, 380 U.S. at 60.

4. To the extent that the MTA argues that the prior restraint doctrine only operates in situations of split-second urgency, the argument is not supported in the law. The Nazi Party had to apply for a permit to march, *in advance*, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a case upon which the MTA relies (Pet. 24). Likewise, the producer of the dramatic production in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), which the MTA urges this Court to disavow (Pet. 24-25),[12] had to apply, *in advance*, for permission

11. The MTA also errs and overstates in claiming "the prior restraint doctrine can have no logical application . . . where the speaker must . . . obtain advance permission to gain access to scarce government resources". Pet. 23. While the government may impose a license or permit requirement in order to regulate competing uses of public fora, it must meet the constitutional requirements in doing so. *Forsyth County v. Nationalist Movement*, 505 U.S. at 128; *see, e.g., Shuttlesworth v. Birmingham*, 394 U.S. at 150-51 ("A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional"); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

12. Petitioner cites *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which held valid city noise control guidelines, in support of its plea that this (Cont'd)

to exhibit its dramatic production in the municipal auditorium.[13] *See also Lakewood v. Plain Dealer*, 486 U.S. at 771. In short, the MTA's "immediacy" requirement for application of the prior restraint doctrine is neither supported by case law nor supportable.

5. To persuade this Court to review this case at this preliminary juncture, the MTA posits a renegade Second Circuit purposefully disregarding limits on the prior restraint doctrine and "evading" precedents of this Court regarding commercial speech. Pet. 7, 20. Neither is the case. Whether the speech in issue here is categorized as core or commercial, it clearly constitutes criticism of government and, on that basis alone, is entitled to full First Amendment protection, including the application of the prior restraint doctrine.[14]

(Cont'd)

Court reexamine *Southeastern Promotions*. Pet. 24-25. But the guidelines at issue in *Ward* were content-neutral and therefore only subject to time, place and manner restrictions on expressive conduct. The MTA has never maintained that its Standards are time, place, or manner restrictions on expressive conduct. Nothing in *Ward* cast doubt on the continuing validity of *Southeastern Promotions* (which concerned exclusion of a category of speech), and which has been cited with approval in recent Supreme Court cases. *See, e.g., National Endowment for the Arts v. Finley*, No. 97-371, 1998 U.S. LEXIS 4211, at *31 (June 25, 1998).

13. Strangely, the MTA argues that "[that] case did not involve the allocation of scarce space among competing uses". Pet. 24. How can it be said that the outside of literally thousands of city buses is less scarce than a single municipal auditorium? Further, the sparse record here is silent as to the number of advertisers competing for that advertising space or the "scarcity" of it.

14. This Court has emphasized that it " 'retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel' for 'public men are, as it were, public property', and

(Cont'd)

The Court of Appeals did not determine whether the Advertisement should be deemed core or commercial speech because it did not need to. But that court noted, as this Court has noted, that the line between core and commercial speech is frequently difficult to draw and is not subject to any "bright-line" test. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring); Pet. 14a. The peculiar facts here amply illustrate the point: the Advertisement contains some elements of fully-protected First Amendment speech including political criticism, humor, and satire, and some elements of commercial speech, as it undoubtedly strives to maximize *New York* Magazine's readership. At a bare minimum, it seems fair to conclude that the commercial and non-commercial messages of the Advertisement are "inextricably intertwined"; therefore, as a mixed message, it must be treated as "pure speech". *See Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-96 (1988).

Contrary to the MTA's assertion (Pet. 20), this Court has never held that the doctrine of prior restraint does not apply to commercial speech. The very quotes petitioner selects from *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 n.13 (1980), and *Virginia State Bd. of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 771-772 n.14 (1976), (Pet. 20-21), use the word "may" and do not decide

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(Cont'd)
'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled' ". *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964) (quoting *Beauharnais v. Illinois*, 343 U.S. 250, 263-64 (1952)). Further, "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office". *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988).

the question. To remove *all* commercial speech from the presumption against suppression that this bedrock First Amendment principle mandates, would be inconsistent with the very philosophy underpinning those few distinctions in protectability of core and commercial speech which the modern Court has been willing to draw. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). For like reason, the MTA errs in concluding that the inapplicability of the prior restraint doctrine is "compelled" by the commercial speech doctrine. Pet. 20. While commercial speech is, under some circumstances, accorded lesser protection than core speech, the rationales articulated for that lesser standard, *i.e.*, the fact that its "hardier" status renders it less likely to be chilled by regulation, and that its greater "objectivity" justifies governmental regulation distinguishing truth from falsity, do not translate into a justification for the wholesale abandonment of the prior restraint doctrine for commercial speech. Certainly, none of those rationales apply to this particular Advertisement.

6. Finally, as to the "extraordinary practical implications" of the Second Circuit decision that the MTA posits, they are totally unsupported in the record. While the MTA may expansively read that decision to require it to display advertisements that it regards as harmful (Pet. 25), no place has the MTA articulated how *this* Advertisement could even "reasonably" be regarded as harmful. The suggestion that displaying this Advertisement would turn the public transit system "into a no-holds-barred pit of frightening, offensive, degrading, unhealthful or illegal images" (Pet. 26) is absurd!

Nothing in the Second Circuit decision "effectively forbids advance determinations of who may purchase advertising space on MTA transit facilities". *Id.* This case illustrates the contrary: the Advertisement was submitted for approval five weeks in advance of scheduled posting. Had the MTA, without the

Mayor's prompting, determined that there was a problem with it, there was more than ample opportunity to secure an advance determination. In any event, similar dire warnings of "administrative nightmares" were urged on this Court and rejected as more theoretical than practical in *Morse v. Republican Party*, 517 U.S. 186, 227 (1996). They should engender no more attention here.

Nor does the Second Circuit decision create "perverse system of incentives" (Pet. 14) forcing the MTA to exclude political advertising or, more draconian yet, cease allowing advertising altogether. Of course, the MTA has the option of doing so. As this Court said in rejecting the same argument when advanced by the U.S. Post Office:

> We have noted that "[t]he United States may give up the Post Office when it sees fit, but while it carries on the use of the mails is as much a part of free speech as the right to use our tongues".

Cincinnati v. Discovery Network, 507 U.S. at 427 (quoting *Blount v. Rizzi*, 400 U.S. 410, 416 (1971)).

If it does anything at all beyond requiring the MTA to display the Advertisement, the Second Circuit decision requires *legitimate* advance regulation of advertising content. The only caveat, and it is a constitutional one, is that such regulation must survive either strict or intermediate scrutiny, as the case may be. Clearly articulated, narrowly-tailored, and procedurally sound standards for legitimate exclusion would allow potential advertisers to plan accordingly, while at the same time protecting their rights and serving the MTA's legitimate, governmental interests. Having dedicated the outside of city buses to all categories of speech, if the MTA wishes to exclude a particular example of such speech, it must justify its actions under

standards which are both precise and constitutional. More to the point in *this* case, the MTA must also follow them.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — BOARD RESOLUTION

BOARD RESOLUTION

WHEREAS, in a Staff Summary, dated March 14, 1994, the Legal Department of the Metropolitan Transportation Authority recommended the adoption of standards set forth in Appendix A hereto (the "Standards") for incorporation into future contracts for the display of advertising on the property and facilities of the Metropolitan Transportation Authority and/or its operating agencies (collectively, the "MTA"); and

WHEREAS, the MTA has a compelling interest in promoting the orderly administration and operation of the MTA transportation system, including the transit system and commuter railroads; and

WHEREAS, the MTA has a compelling interest in maximizing revenues by attracting and maintaining patronage of the MTA transportation system; and

WHEREAS, a substantial number of minors travel on the MTA transportation system, including children who use the MTA transit system as their primary means of transportation to and from school, and the MTA has a compelling interest in protecting such minors from speech that is harmful to them; and

WHEREAS, the MTA has a compelling interest in avoiding the potential identification of the MTA with the viewpoints of advertisers; and

WHEREAS, the MTA has a compelling interest in furthering the interests of MTA patrons in avoiding unwanted and unavoidable confrontations with advertisements that, under

Appendix A

New York Penal Law § 245.11, are not permitted to be displayed in public places, including transportation facilities;

NOW, THEREFORE, IT IS RESOLVED that, in light of the above and in light of the nature and size of the MTA transportation system, the MTA hereby adopts the Standards for incorporation into future contracts for the display of advertising on MTA properties and facilities; and

IT IS FURTHER RESOLVED that the Standards advance the compelling interests of the MTA identified above.

Dated: March 25, 1994

Appendix A

APPENDIX A: ADVERTISING STANDARDS FOR THE METROPOLITAN TRANSPORTATION AUTHORITY

The following Standards shall apply to all licenses for the installation, display and maintenance of advertising on properties and facilities operated by the Metropolitan Transportation Authority and/or its operating agencies (collectively, the "MTA") executed on or after [March __, 1994].

(a) *Limitations Upon Advertisements.* The licensee shall not display or maintain any advertisement that falls within one of more of the following categories:

(i) The advertisement proposes a commercial transaction, and the advertisement or information contained in it is false, misleading or deceptive.

(ii) The advertisement or information contained in it promotes unlawful or illegal goods, services or activities.

(iii) The advertisement or information contained in it implies or declares an endorsement by the MTA of any service, product or point of view without prior written authorization of the MTA.

(iv) The advertisement contains obscene material. For purposes of this provision, the term "obscene" shall have the meaning contained in New York Penal Law § 235.00 (attached as Exhibit 1), as such provision may be amended, modified or supplemented from time to time.

Appendix A

(v) The advertisement contains an image or description, which, if sold or loaned to a minor for monetary consideration with knowledge of its character and content, would give rise to a violation of New York Penal Law § 235.21 (attached as Exhibit 2; *see also* Exhibit 3 (New York Penal Law § 235.20 (definitions of terms))), as such provision may be amended, modified or supplemented from time to time.

(vi) The advertisement contains an image or description which, if displayed in a transportation facility with knowledge of its character and content, would give rise to a violation of New York Penal Law § 245.11 (attached as Exhibit 4; *see also* Exhibit 5 (New York Penal Law § 245.10 (definitions of terms))), as such provision may be amended, modified or supplemented from time to time.

(vii) The advertisement, or any information contained in it, is libelous or violates New York Civil Rights Law § 50 (attached as Exhibit 6), as such provision may be amended, modified or supplemented from time to time.

(viii) The advertisement proposes a commercial transaction, and promotes tobacco or tobacco-related products.

(b) *Advertising Standards Committee.* The MTA shall establish a three member Advertising Standards Committee (the "Committee"). The Committee shall

be composed of: one member appointed by the MTA General Counsel, one member appointed by the MTA Director of Real Estate and one member appointed by the MTA Director of Policy and Planning.

(c) *Review of Advertisements.* MTA advertising contractors shall review each advertisement submitted for installation, display and maintenance on MTA properties and facilities to determine whether the advertisement falls within, or may fall within, one or more of the categories set forth in Clause (a) of these Standards. If an MTA advertising contractor determines that an advertisement falls within or may fall within one or more of the categories set forth in Clause (a) of these Standards:

(i) The MTA advertising contractor shall promptly provide the advertiser with a copy of these Standards and written notice of: the determination; the reason(s) for the determination; and the advertiser's right to request a prompt review before the Committee.

(ii) The MTA advertising contractor shall provide the Committee with a copy of the written notice to the advertiser and the advertisement at issue.

(iii) Upon request of the advertiser, the Committee shall conduct a prompt review to determine whether the advertisement at issue falls within one or more of the categories set forth in Clause (a) of these Standards.

(iv) The Committee shall promptly provide the advertiser and the advertising contractor with a written notice of its determination. The Committee's determination shall be final.

(d) If any category set forth in Clause (a) of these Standards is determined to be invalid as applied to any particular type of MTA property or facility, the category shall remain applicable to other types of MTA properties and facilities.

Appendix A

New York Penal Law §235.00

§ 235.00. Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) the average person, applying contemporary community standards, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, it lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

Appendix A

5. "Wholesale promote" means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale.

6. "Simulated" means the explicit depiction or description of any of the types of conduct set forth in clause (b) of subdivision one of this section, which creates the appearance of such conduct.

7. "Sodomy" means any of the types of sexual conduct defined in subdivision two of section 130.00 provided, however, that in any prosecution under this article the marital status of the persons engaged in such conduct shall be irrelevant and shall not be considered.

EXHIBIT 1

Appendix A

New York Penal Law §235.21

§ 235.21. Disseminating indecent material to minors

A person is guilty of disseminating indecent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

2. Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation.

Disseminating indecent material to minors is a class E felony.

EXHIBIT 2

Appendix A

New York Penal Law §235.20

§ 235.20. Disseminating indecent material to minors; definitions of terms

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

Appendix A

(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

EXHIBIT 3

Appendix A

New York Penal Law §245.11

§ 245.11. Public display of offensive sexual material

A person is guilty of public display of offensive sexual material when, with knowledge of its character and content, he displays or permits to be displayed in or on any window, showcase, newsstand, display rack, wall, door, billboard, display board, viewing screen, moving picture screen, marquee or similar place, in such manner that the display is easily visible from or in any: public street, sidewalk or thoroughfare[1]; transportation facility[2]; *or any place accessible to members of the public without fee or other limit or condition of admission such as a minimum age requirement and including but not limited to schools, places of amusement, parks and playgrounds but excluding rooms or apartments designed for actual residence;* any pictorial, three-dimensional or other visual representation of a person or a portion of the human body that predominantly appeals to prurient interest in sex, and that:

(a) depicts nudity, or actual or simulated sexual conduct or sado-masochistic abuse; or

(b) depicts or appears to depict nudity, or actual or simulated sexual conduct or sado-masochistic abuse, with the area of the male or female subject's unclothed or apparently unclothed genitals, pubic area or buttocks, or of the female subject's unclothed or apparently unclothed breast, obscured by a covering or mark placed or printed on or in front of the material displayed, or obscured or altered in any other manner.

Public display of offensive sexual material is a Class A misdemeanor.

EXHIBIT 4

Appendix A

New York Penal Law §245.10

§ 245.10. Public display of offensive sexual material; definitions of terms

The following definitions are applicable to section 245.11:

1. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

2. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast.

3. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizzarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

4. "Transportation facility" means any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, railroad, motor vehicle or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations and all appurtenances thereto.

EXHIBIT 5

Appendix A

New York Civil Rights Law §50

§ 50. Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

EXHIBIT 6

(3)

No. 97-2020

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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE METROPOLITAN TRANSPORTATION AUTHORITY,
PETITIONER,

v.

NEW YORK MAGAZINE, A DIVISION OF
PRIMEDIA MAGAZINES, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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11 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Forum Issue 2

II. The Prior Restraint Issue 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

Cases

Cornelius v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) 4

Freedman v. *Maryland*, 380 U.S. 51 (1965) 7

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 3

Rogers v. *New York Transit Authority*, 680 N.E.2d 142 (N.Y. 1997) 3

Rosenberger v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) 4, 5

Southern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 6

United States v. *Kokinda*, 497 U.S. 720 (1990) 4

Statutes

N.Y. Civ. R.L.§ 50 . . . . . 1, 5

Miscellaneous

R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE (7th ed. 1993) 2

REPLY BRIEF FOR PETITIONER

Respondent attempts to hide the importance and breadth of the Second Circuit's holding by focusing myopically on the circumstances of this case. Respondent thus suggests a host of fact-specific reasons why it *might* have deserved to prevail in this litigation: that the MTA allegedly failed to follow its own regulations (Opp. 4-5); that respondent's contractual rights were violated (Opp. 2); that the advertisement in question was a "political satire" and not a product endorsement (Opp. 5); that the advertisement ran on the outside, not the inside, of buses (Opp. 11 n.4); that the MTA did not establish sufficient governmental justification for its refusal to run this particular advertisement (Opp. 2-3).[1] Respondent also complains that the record below is inadequate to resolve some or all of these issues (Opp. 3, 9).

But respondent *actually* prevailed in the Second Circuit on the basis of a broad constitutional holding that not only severely limits the MTA's ability to enforce any limit on the use of advertising space in its transit system, but also has ramifications for all transit agencies. As we explain in the Petition, the court of appeals held that the MTA's action was unconstitutional for two reasons: (1) that because the advertising space on MTA vehicles is an unlimited public forum, each of the categories of excluded speech in the Advertising Standards must be justified by a compelling governmental interest; and (2) that because refusal of advertisements is a form of prior restraint, the MTA may not decline to run any advertisement — even one constituting commercial speech — without advance judicial approval. Indeed, notwithstanding its diversionary focus on the facts of the case,

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[1] Respondent states, several times, that its advertisement was rejected pursuant to a Standard that prohibits an "advertisement that *may* violate § 50 of the New York Civil Rights Law" (Opp. 4, 13, 18, 19 (emphasis in original)). This is incorrect. The Standard in question prohibits any advertisement that "violates § 50 of the New York Rights Law." To the extent that respondent's argument depends on this error (see, *e.g.*, Opp. 19), it is without merit. Moreover, contrary to insinuations in the Brief in Opposition that the advertisement was excluded because of political pressure from the Mayor's Office (see Opp. 5, 16-17), the district court found, based on undisputed facts, that "the Ad was excluded because [the MTA] Chairperson agreed with the Deputy Mayor that the Ad violated the terms of Section 50." Pet. App. 38a.

respondent *agrees* with our characterization of the Second Circuit's holding, acknowledging that under the court of appeals' decision the MTA's Advertising Standards "must be justified as exclusions [that are] narrowly tailored to serve a compelling governmental interest" (Opp. 7) and that the MTA's rejection of the Advertisement was invalidated by the court of appeals because "the MTA failed to carry its heavy burden of justifying the imposition of a prior restraint" (Opp. 3).

Should the Court grant review and reverse the Second Circuit's remarkable holdings, New York Magazine would be free, on remand, to raise any other issues that it may think are implicated by the facts of this case. But the existence of these other potential issues does not detract from the fact that the decision below is of importance far beyond the specific factual circumstances of this case. The court of appeals' holdings raise pure issues of constitutional law, not dependent on the record. They have great precedential importance, with potentially disruptive effects for government agencies wherever the Second Circuit's ruling may be accepted. And they conflict with decisions of this and other courts. Those holdings therefore warrant review by this Court.

It should be added that respondent is wrong in its assertion (Opp. 3, 8-9) that review is inappropriate because this case involves a preliminary injunction and therefore is in an interlocutory posture. Absolutely nothing in the analysis of the court of appeals turned either on the preliminary nature of the injunction sought by respondent or on the state of the record; the court issued a categorical legal holding that resolved issues of First Amendment law. There is no prospect of a different outcome on remand to the district court. The MTA — and all other transit authorities subject to the Second Circuit's rule — therefore are now governed by the holding announced by the court of appeals. In these circumstances, where there is nothing to be gained by delay and the decision below is having an immediate and far-reaching impact, review by this Court is in order. See R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 196-197 (7th ed. 1993).

I. The Forum Issue

As explained more fully in the Petition, the Second Circuit's holding on the forum issue is based on two highly questionable

propositions. The Brief in Opposition defends both of those propositions, though it supplies neither authority nor reasoning (other than paraphrase of the Second Circuit opinion) to support them.

First, the court below held that MTA advertising space is a public forum because the MTA — unlike the transit system in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) — accepts paid political advertisements as well as commercial advertisements. As explained in the Petition (13-15), this holding has no precedential support and is logically indefensible. The MTA, like private, profit-making billboard companies, makes money from selling advertising space to political candidates. No one imagines that private billboard companies cease to operate in a profit-making capacity when they sell their space to political candidates, and there is no reason to think differently of the MTA. Though we made this point in the Petition, respondent offers no response at all.

In its Brief in Opposition, respondent nevertheless endorses the Second Circuit's reasoning that "the fact that the MTA allows political speech serves to underscore the conclusion that the MTA operates the outside of the city buses in a regulatory, rather than a proprietary capacity, and thus intended to open the space to the public at large." Opp. 10. Respondent does not cite any authority for that proposition (other than a quotation from the Second Circuit), nor does it offer any reasoning to support its assertion.

This obviously is a legal question of great importance to transit agencies (and other governmental agencies that sell advertising space) nationwide. If the Second Circuit is correct, transit agencies cannot sell advertising to political candidates or political causes without forfeiting their right, under *Lehman* v. *City of Shaker Heights*, to exercise their discretion to refuse advertising that they reasonably believe would be detrimental to their primary function. Nothing said in the Brief in Opposition diminishes the certworthiness of this aspect of the forum issue.[2]

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[2] Respondent's only attempt to distinguish *Lehman* is the peculiar suggestion that, in supposed contrast to the regime in Shaker Heights, the MTA Advertising Standards do "not restrict [MTA] advertising space by excluding any 'categories' of speech." Opp. 11. This ground also is the

Second, the court of appeals hinged its forum analysis on its claim that each exclusion of a category of speech from a limited public forum must be supported by a compelling governmental interest. Pet. App. 10a. In the Petition, we cited decisions of this Court holding that exclusions of categories of speech within a limited public forum need only be reasonable and viewpoint-neutral to survive First Amendment scrutiny. Pet. 17, citing *Rosenberger* v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829-30 (1995); *United States* v. *Kokinda*, 497 U.S. 720, 730 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). In the Brief in Opposition, however, respondent simply ignores this conflict with controlling Supreme Court precedent, describing the Second Circuit's view as "clearly correct" and citing as authority — the Second Circuit itself! Most remarkably, after quoting the Second Circuit's holding, respondent provides the following citation: "Pet. App. 10a (citations omitted)." See Opp. 14. It is telling that the "citation omitted" is one to the *dissenting opinion* of Justice Blackmun in *Cornelius*. In effect, the court of appeals has adopted the view of the *Cornelius* dissent. Such a conflict with this Court's decisions clearly warrants further review, if not summary reversal.[3]

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sole basis on which respondent seeks to distinguish *Rogers* v. *New York Transit Authority*, 680 N.E.2d 142 (N.Y. 1997). See Opp. 11 n.5. But this argument played no part in the Second Circuit's analysis, and in any event is wholly baseless. Respondent may not agree with the Standards, but surely proscriptions on advertisements that promote tobacco products, or that depict minors in sexually suggestive poses, or that invade privacy, are exclusions of certain "categories" of speech; respondent offers absolutely no reason to believe that these sorts of speech are any more or less "categories" of expression for First Amendment purposes than were the political advertisements excluded from the Shaker Heights transit system. In this regard, we note that Shaker Heights did *not* exclude all noncommercial speech. See Pet. 14 n.7.

[3] In arguing to the contrary, respondent asserts that the MTA permits "all categories of speech" and that "[t]he MTA cannot use its regulations to define the limits — and therefore the nature — of its forum, because those limitations are limitations *within* a category of speech." Opp. 13, 14 (emphasis in original). This cryptic *ipse dixit*, however, is unsupported

In defense of the Second Circuit's position, respondent offers the hypothetical of an excluded category of "'magazine promotions parodying the Mayor.'" Opp. 14. It suggests that, under our analysis, such a limitation would be constitutional. But this disregards the fact that, under this Court's holdings, exclusions must be both reasonable and viewpoint neutral. Respondent's hypothetical category is neither. For the same reason, respondent's invocation of *Rosenberger* is off the mark. The University of Virginia's exclusion of "religious" activities was struck down precisely because it was *viewpoint* discriminatory. 515 U.S. at 831 ("viewpoint discrimination is the proper way to interpret the University's objections"). The petitioners in *Rosenberger* did not suggest, and the Court did not hold, that the various other exclusions from the Student Activities Fund, which *were* reasonable and viewpoint neutral, were subject to strict scrutiny. See *id.* at 824-825 (noting other exclusions). The Standard under which respondent's advertisement was rejected is neither unreasonable nor viewpoint discriminatory, and should therefore have been upheld.[4]

Respondent concludes by asserting that "[a]llowing a transit facility such as the MTA to destroy the otherwise 'open' status of a forum by regulating within a category of speech would avoid the constitutional imperative that it justify such exclusion under strict

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by anything in respondent's brief and is insupportable as a matter of law. The MTA, of course, most assuredly does *not* permit "all categories of speech"; it has defined the relevant forum to exclude the categories identified in the Advertising Standards. And as we note above, respondent offers no justification for its bizarre assertion that the Standards do not identify "categories" of expression.

[4] Respondent's assertion that compliance with Section 50 of the New York Civil Rights Law serves no reasonable purpose (Opp. 16) cannot be taken seriously. As the district court stated, "[m]ost states now have laws similar to Section 50," and they serve a number of public purposes. Pet. App. 40a. Respondent will free on remand to pursue its further contention that the "facts of this case * * * strongly suggest impermissible viewpoint discrimination" (Opp. 16) if this Court grants review and reverses the decision below. The Second Circuit decision *now* subject to review was not based on the allegation of viewpoint discrimination, or indeed on any arguments related to the facts of this particular case.

or intermediate scrutiny." Opp. 15-16. But this begs the question. This Court has consistently held that the government does not create an "open forum" except by deliberate act, and that categorical limitations on a limited public forum are subject to review only for reasonableness and viewpoint neutrality. It was inappropriate for the Second Circuit to impose a new and more draconian rule simply because it disagreed with this Court's precedents.

II. The Prior Restraint Issue

The Second Circuit held that refusal of an advertisement constitutes a form of a prior restraint, necessitating the highest level of procedural safeguard, both for "core-protected speech" and for "commercial speech." Pet. App. 13a-14a. Contrary to respondent's suggestion that this holding applies only to some advertisements (Opp. 18), or maybe only to this advertisement (Opp. 23), by its plain terms the Second Circuit's sweeping decision applies to all advertisements — since all advertisements are either "commercial speech" or "core-protected speech," and the Second Circuit expressly declined to distinguish between them. Pet. App. 14a.

Moreover, the Second Circuit's holding requires the MTA to provide procedural protections, including judicial proceedings, in advance of refusing to display an offensive advertisement. The court stated: "These safeguards require, inter alia, that 'the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor,' and that 'a prompt final judicial determination must be assured.'" Pet. App. 13a, quoting *Southern Promotions Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975). Respondent attempts to minimize the disruption entailed by such a requirement by asserting that "[n]othing in the Court of Appeals decision requires the MTA to undertake 'cumbersome judicial proceedings' in every instance" and that "[n]ot every administrative proceeding challenging an adverse determination under the Standards will necessitate further judicial action." Opp. 19, 20. But respondent fails to explain which proceedings would not "necessitate further judicial action"; perhaps respondent is referring to cases in which one party or the other decides to acquiesce. For its part, the Second Circuit made clear that in *every* adverse

determination, the would-be speaker must be given the *opportunity* for prompt judicial review, and the "censor" (the MTA) must bear the burden of instituting the proceedings. Pet. App. 13a.[5]

This an extraordinary requirement. Respondent pointedly does not deny that it would force a dramatic modification of the practices of every transit agency in the country, that it would obligate the MTA to display harmful and offensive advertisements, and that it would render virtually impossible any meaningful system of advertising regulation. Rather, respondent urges this Court to ignore the systemic consequences of the Second Circuit's constitutional holding, and focus instead on what it says would be the minimal consequences of that holding under the facts of this particular case. See Opp. 23. Respondents are correct that it would be "absurd" to suggest that "displaying this Advertisement would turn the public transit system 'into a no-holds-barred pit of frightening, offensive, degrading, unhealthful or illegal images." *Id.*, quoting Pet. 26.[6] But it is not at all "absurd" to recognize that the Second Circuit's constitutional ruling, which applies across the board to all the Standards and to all potential advertisements, would have that effect. The holding below applies not just to this advertisement, but to tobacco ads, to ads depicting minors in sexually suggestive clothing or poses, and to other ads which — however lawful and legitimate in some settings — could reasonably be viewed by the MTA as harmful to its commercial ihterests. See Brief Amicus Curiae of Agudath Israel of America. By the same

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[5] While respondent declares that "administrative review" may suffice in some circumstances to validate a prior restraint (Opp. 20), the decisions that respondent cites in support of this proposition make clear that prior *judicial* review is essential. See, *e.g.*, *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965), cited at Opp. 20.

[6] This is not to say that application of the Second Circuit's holding in this particular case would have no ill effects. All persons in New York, including its political figures, are protected from having their names used in the commercial advertising of products without their permission. Some may question why Mayor Giuliani would object to "more publicity" (Pet. App. 22a). But the right to give or withhold consent belongs to the individual.

token, the possibility that there was adequate time in this case to resolve the problem in advance (Opp. 23-24) does not detract from the impact of the Second Circuit's ruling in other cases.

In sum, respondent does not dispute the disruptive effect of the Second Circuit's holding as a general matter, or deny that the decision below raises important and unsettled questions of First Amendment law: the applicability of prior restraint doctrine to commercial speech in a setting where the government must choose among competing potential speakers for limited space. The entire theme of the response is that the particular facts of this case do not pose a major problem. But petitioner is not asking this Court to review the Second Circuit's decision because of the consequences of this particular case; we are asking the Court for review because of the holding's extraordinary implications for the conduct of public transit agencies, not only in New York but also around the country.

CONCLUSION

For these reasons, and the reasons stated in the Petition, this Court should grant the Petition for Certiorari in this case.

Respectfully submitted.

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NEW YORK MAGAZINE, A DIVISION OF PRIMEDIA MAGAZINES, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases **Page**

Arkansas Educational Television Commission v. *Forbes*,
118 S. Ct. 1633 (1998) 5

International Society for Krishna Consciousness v. *Lee*,
505 U.S. 672 (1992) 2

Lehman v. *City of Shaker Heights*,
418 U.S. 298 (1974) 5

New York Magazine v. *Metropolitan Transportation Authority*,
136 F.3d 123 (2d Cir. 1988) 5

New York Magazine v. *Metropolitan Transportation Authority*,
987 F. Supp. 254 (S.D.N.Y. 1997) 7

Southeastern Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1975) 2

Other Authorities

"A Vivid-Livid Divide," *New York Times Business Day*,
at D-1, July 19, 1998 2

Pursuant to New Rule 37.6, none of the parties authored this brief in whole or in part and no one other than the Agudath Israel of America, its members, or counsel contributed money or services to the preparation or submission of this brief.

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INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America respectfully submits this *amicus curiae* brief, with the consent of the parties, for one essential purpose: to bring to the Court's attention the larger communal interest in this case.

The specific dispute that precipitated this proceeding, over a satirical advertisement that referred to the mayor of

New York City by name without obtaining his prior consent, may at first blush appear to be of narrow concern and perhaps less than *cert*-worthy, but the larger ramifications of the Second Circuit panel's 2-1 ruling below are substantial and merit the Court's careful consideration. The majority ruled that advertising space leased by the Metropolitan Transportation Authority is a "designated public forum," so as to require the MTA to demonstrate that content-based restrictions on advertising are "narrowly drawn to achieve a compelling state interest," *International Society for Krishna Consciousness* v. *Lee*, 505 U.S. 672, 678 (1992); and that any decision by the MTA to reject a commercial ad is a "prior restraint," so as to impose on the MTA "the burden of instituting judicial proceedings, and of proving that the material is unprotected," *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 560 (1975). The decision was rendered in the context of a satirical ad that few would find offensive, but its real significance is that it severely curtails the ability of urban transit agencies like the MTA to reject even the most highly objectionable advertisements.

Over the past several years, Agudath Israel -- a 76-year-old *New York*-based national Orthodox Jewish organization -- has noted with deep concern the growing proliferation of offensive and indecent ads, which assault impressionable young persons with images and messages that are harmful to their healthy moral development. The "trend to be rude, crude and sometimes lewd" in commercial advertising was recently reported on the first page of *The New York Times* business section ("A Vivid-Livid Divide," *New York Times Business Day*, at D-1, July 19, 1998):

> "Sales pitches for a wide variety of products are being ... infused with increasingly explicit images and language, which until recently had been considered too daring for conventional advertising.

". . . .

"Backsides are being bared in advertising for underwear, liquor, skin lotion and fitness equipment and are invoked in colloquial expressions about 'kicking butt' and other synonyms for rear end. Other body parts, particularly those that differentiate men and women, are being uncovered in photographs or referred to in slang terminology.

"Bodily functions from passing gas and urination to vomiting and defecation are depicted and alluded to in advertising for shoes, automobiles, software, games - even food.

"Earthy catch phrases or sayings with double meanings are repeated constantly. 'Are you getting enough?' an ad for cottage cheese coyly asks, referring to calcium. 'Zit happens' is a line in an ad for acne medication, 'Fit happens' in an ad for boots and 'Grease happens' in an ad for spray cleaner. And it has become impossible to count all the variations on such lines as 'Size matters' and '... or are you just glad to see me?'

"Then there is the more daring sexual imagery, extending far beyond traditional realms like fashion and fragrance advertising into such categories as shampoo, beer, video games, cars and resorts. Some ads flaunt signs of arousal, others are festooned with phallic symbols while still others present simulations of sexual intercourse."

Many parents in Agudath Israel's constituency -- and, surely, other groups as well -- do their best to shield their children from such images in their own homes. But parents are powerless to protect their children when they step out in the street. For urban dwellers, especially, who live in areas that rely heavily on mass transit including buses that traverse city thoroughfares, it is becoming increasingly difficult to venture out into the street without being bombarded with commercial ads that utilize lewd and risque images to hawk their wares. Agudath Israel and other like-minded groups have identified this problem as an important quality of life issue, and have brought it to the attention of various policy-making bodies.

In New York City, the MTA responded to these concerns, in part, by adopting advertising standards in March 1994, and then again more recently in September 1997. Pursuant to the 1994 standards, the MTA will not accept ads that contain "obscene" material, material that is "indecent to minors," or "offensive sexual material" as those terms are defined in the New York State Penal Law. The 1997 standards expand upon the list of prohibited ads, so that the MTA will now reject any ad that "contains an image of a person, who appears to be a minor, in sexually suggestive dress, pose or context," "promotes an escort service, dating service, or sexually oriented business," or "contains images or information that would be deemed by a significant segment of the public to be patently offensive, improper, or in bad taste." Also unacceptable under the 1997 standards are ads that "demean an individual or group of individuals on account of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation," or that "are so violent, frightening, or otherwise disturbing as to be harmful to minors."

The Second Circuit's decision below, if allowed to stand, could well effectively nullify these standards. Faced with the expense of having to commence a legal proceeding

every time it wishes to reject an ad under the standards, and the uncertainty of prevailing in its burden of proof that its interest in implementing the standards rises to the level of "compelling," the MTA may well decide entirely to avoid the problem by simply allowing the ad to appear as is. Private citizens would have no legal recourse; there is no theory of law of which we are aware that would enable a member of the public to compel the withdrawal of even the most grossly offensive ad.

It is true that the MTA could take a step, even under the Second Circuit's analysis, that would allow it to retain and effectively enforce its advertising standards: The agency could decide to accept only commercial speech ads and disallow all political speech ads, thereby bringing its policy in line with the policy determined not to create a public forum in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). *See New York Magazine* v. *Metropolitan Transportation Authority*, 136 F.3d 123, 129-30 (2d Cir. 1998). Indeed, if the decision below is allowed to stand, Agudath Israel and other concerned groups will surely press the MTA to take precisely that step. However, as the MTA correctly points out in its petition (at 14-15), the net result of such a drastic step would be "less speech, not more" (quoting *Arkansas Educational Television Commission* v. *Forbes*, 118 S. Ct. 1633, 1643 (1998)) -- hardly cause for First Amendment celebration.

Recognizing the potentially substantial public interest in this case, Agudath Israel submitted an *amicus curiae* brief to the Second Circuit when the district court's decision was appealed. The Second Circuit's expansive ruling, requiring pre-emptive litigation in order to justify what the panel's majority saw as a "prior restraint," has further upped the ante. Stated simply, the communal stake in this case is great.

ARGUMENT

The petitioner's brief amply demonstrates that the panel decision below departs from this Court's established precedent and is in tension with decisions of other lower courts -- both with respect to the question of whether the MTA has allowed its property to become an unlimited designated public forum, and whether refusal of commercial advertising is a prior restraint that would require the MTA to institute a pre-emptive judicial proceeding.

If the Court grants the petition, *amicus curiae* Agudath Israel will offer its own independent analysis of the relevant case law. For now, though, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, Agudath Israel simply adopts petitioner's argument as its own.

CONCLUSION

"Who would have dreamed that the Mayor would object to more publicity? But that is what this case is all about." So stated the district court judge who issued the initial ruling in this case. *New York Magazine* v. *Metropolitan Transportation Authority*, 987 F. Supp. 254, 256 (S.D.N.Y. 1997). In truth, though, "what this case is all about" -- or, at least, what is has become all about in light of the Second Circuit panel ruling -- is something far more weighty: the ability of agencies like the MTA, in an era of proliferating commercial tastelessness and vulgarity, to adopt advertising standards that protect the public, including impressionable children, against images and messages that are offensive, objectionable and harmful. The issue is important, and worthy of Supreme Court review.

For the reasons set forth in the MTA's petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges this Court to grant the petition and accept certiorari.

Respectfully submitted,

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